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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM ALSUP, JUDGE

ORACLE AMERICA, INC.,

PLAINTIFF,)
VS.)
GOOGLE, INC.,) NO. C 10-3561 WHA
DEFENDANT.)
) SAN FRANCISCO, CALIFORNIA
) FRIDAY
) AUGUST 19, 2011
) 8:00 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

BOIES, SCHILLER & FLEXNER, LLP
1999 HARRISON STREET, SUITE 900
OAKLAND, CALIFORNIA 94612
510-874-1460

BY: **STEVEN C. HOLTZMAN, ESQUIRE**

AND

MORRISON & FOERSTER LLP
425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 941205-7455

BY: **MICHAEL A. JACOBS, ESQUIRE**

FURTHER APPEARANCES ON NEXT PAGE

REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR

OFFICIAL REPORTER - US DISTRICT COURT

1 **FURTHER APPEARANCES:**

2 **FOR DEFENDANT:**

3 **KEKER & VAN NEST LLP**

4 633 BATTERY STREET

5 SAN FRANCISCO, CALIFORNIA 94111-1809

6 **BY: ROBERT A. VAN NEST, ESQUIRE**

7 **DANIEL PURCELL, ESQUIRE**

8 **ALSO PRESENT:**

9 **JOHN L. COOPER, ESQUIRE**

10 FARELLA BRAUN + MARTEL, LLP

11 RUSS BUILDING, 17TH FLOOR, 235 MONTGOMERY STREET

12 SAN FRANCISCO, CALIFORNIA 94104

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1 AUGUST 19, 2011

8:00 O'CLOCK A.M.

3 P R O C E E D I N G S

4 **MR. VAN NEST:** GOOD MORNING, YOUR HONOR.5 **MR. JACOBS:** GOOD MORNING, YOUR HONOR.6 **THE COURT:** PLEASE BE SEATED.7 SO THIS IS ORACLE VERSUS GOGLE, 10-3651. LET'S HAVE
8 OUR APPEARANCES, PLEASE.9 **MR. VAN NEST:** GOOD MORNING, YOUR HONOR. BOB VAN
10 NEST AND DAN PURCELL FROM KEKER & VAN NEST FOR GOOGLE.11 **THE COURT:** WELCOME.12 **MR. VAN NEST:** THANK YOU.13 **MR. JACOBS:** MICHAEL JACOBS AND STEVE HOLTZMAN FOR
14 ORACLE.15 **THE COURT:** OKAY. WELCOME TO YOU. OKAY.16 WE'RE HERE BECAUSE I INVITED YOU HERE WITH RESPECT TO
17 THE 706 EXPERTS. SO DO WE HAVE OUR EXPERTS OUT THERE?18 **MR. VAN NEST:** WE DO, YOUR HONOR.19 **THE COURT:** OKAY. GOOD. AND I SEE ATTORNEY JOHN
20 COOPER THERE.21 **MR. COOPER:** GOOD MORNING.22 **THE COURT:** GOOD MORNING. SO HERE'S WHAT I WANT TO
23 DO. I WANT TO HAVE THE TWO EXPERTS COME SIT IN THE JURY BOX.
24 AND THEN, I WANT TO HAVE ATTORNEY COOPER COME SIT ON THE FRONT
25 ROW.

1 THE LAW CLERK: WOULD YOU LIKE ME TO MOVE?

2 **THE COURT:** YOU CAN MOVE RIGHT OVER THERE.

3 THANK YOU.

4 HAVE YOU TWO GENTLEMEN MET MR. COOPER YET?

5 **MR. KEARL:** YES, BRIEFLY.

6 **THE COURT:** ALL RIGHT. WHY DON'T YOU EACH SIT ON THE
7 FRONT ROW? YOU DON'T HAVE TO SIT SIDE-BY-SIDE.

8 MAYBE -- YES, SEATS ONE AND THREE WILL GIVE YOU
9 PLENTY OF ROOM TO SPREAD OUT. THANK YOU.

10 WELCOME, AGAIN. LET ME MAKE SURE I UNDERSTAND WHO IS
11 WHO.

12 YOU ARE WHO?

13 **MR. DEGEN:** I'M CARL DEGEN.

14 **THE COURT:** DEGEN? DEGEN?

15 **MR. DEGEN:** DEGEN.

16 **THE COURT:** YOU ARE FROM WISCONSIN?

17 **MR. DEGEN:** CORRECT.

18 **THE COURT:** GOOD. WE WILL COME BACK TO THAT.

19 AND YOU ARE WHO?

20 **MR. KEARL:** JIM KEARL.

21 **THE COURT:** AND YOU'RE FREE UTAH.

22 **MR. KEARL:** YES.

23 **THE COURT:** ALL RIGHT. SO, HERE IS THE SITUATION. WE
24 HAVE A PATENT CASE, POSSIBLY A PATENT AND COPYRIGHT CASE. BUT I
25 WOULD SAY MAINLY A PATENT CASE. ONE SIDE IS ORACLE, ORACLE --

1 NOT ORACLE, BUT ORACLE SOMETHING.

2 **MR. VAN NEST:** ORACLE AMERICA.

3 **THE COURT:** ORACLE AMERICA. THEY ARE THE PLAINTIFF.

4 AND THEN, ON THE OTHER SIDE IS GOOGLE. AND THIS IS A
5 CASE WHERE ORACLE AMERICA IS ASSERTING PATENTS THAT IT ACQUIRED
6 THAT RELATE TO THE JAVA SYSTEM WHEN IT ACQUIRED THE SUN
7 MICROSYSTEMS COMPANY.

8 AND THEN, ORACLE SUED GOOGLE, AND PARTICULARLY WITH
9 RESPECT TO ITS ANDROID OPERATING SYSTEM, SAYING THAT IT
10 INFRINGES THOSE PATENTS. SO THAT'S A VERY SIMPLISTIC VIEW OF THE
11 CASE.

12 I HAVE HAD SOME DEALINGS WITH THE LAWYERS ALREADY ON
13 THE ISSUE OF DAMAGES, ASSUMING THAT LIABILITY IS PROVEN. AND
14 THAT HAS CAUSED THE COURT, MEANING ME, TO THINK THAT POSSIBLY,
15 VERY LIKELY, THE JURY WOULD BENEFIT FROM HAVING AN INDEPENDENT,
16 PROFESSIONAL VIEW AS OPPOSED TO THE VIEWS OF EXPERTS THAT ARE
17 RETAINED AND PAID FOR BY THE COMPETING SIDES.

18 NOW, OF COURSE, THE JURY WOULD STILL HEAR ALL OF THE
19 EXPERTS RETAINED BY THE TWO SIDES, BUT IN ADDITION THE JURY
20 WOULD HEAR THE COURT-APPOINTED EXPERT. SO RULE 706 ALLOWS THE
21 JUDGE TO DO THIS.

22 THE FEDERAL CIRCUIT LAW ALLOWS THE JUDGE TO DO THIS,
23 ESPECIALLY IN A CASE LIKE THIS WHERE THE TWO SIDES ARE
24 DRAMATICALLY FAR APART, AND THE ISSUES ARE NOT SIMPLE.

25 SO I AM BASICALLY INTERVIEWING THE TWO OF YOU TO GIVE

1 YOU A HEADS-UP ON WHAT WOULD BE REQUIRED AND SEE IF YOU ARE
2 INTERESTED IN IT AND WHAT YOU WOULD CHARGE AND WHETHER YOU WOULD
3 DO THE WORK AS OPPOSED TO UNDERLININGS DOING THE WORK, WHICH IS
4 IMPORTANT TO ME. AND WHETHER YOU CAN EVEN FIT IT IN WITHIN THE
5 TIMETABLE WE'VE GOT. MAYBE YOU'RE UNABLE TO.

6 SO, IN ADDITION, ATTORNEY JOHN COOPER, WHO IS THE
7 MODEL OF THE OFFICER OF THE COURT WITHOUT ANY CHARGE, ZERO
8 CHARGE, HAS OFFERED TO REPRESENT WHOEVER OF YOU TWO GETS THIS
9 ASSIGNMENT TO ASSIST YOU.

10 IN OTHER WORDS, HERE YOU ARE THROWN INTO THIS LARGE
11 CASE. PROBABLY YOU COULD HANDLE IT ON YOUR OWN, BUT ATTORNEY
12 JOHN COOPER, WHO IS ONE OF THE FINEST LAWYERS IN CALIFORNIA,
13 PERHAPS AMERICA -- PROBABLY AMERICA -- CAN HELP GUIDE YOU
14 THROUGH THE PROCEDURES. AND HE'S OFFERED TO DO THAT, AND I
15 CAN'T SAY HOW MUCH I APPRECIATE THAT.

16 I THINK WE'RE GOING TO START OFF, THOUGH, BY LETTING
17 EACH SIDE HAVE THREE OR FOUR MINUTES -- THEY DON'T KNOW THAT I'M
18 GOING TO MAKE THEM DO THIS -- TO JUST GIVE YOU THEIR PITCH TO
19 EXPLAIN THE CASE AND WHAT THEY SEE YOUR ROLE WOULD BE OR WHAT
20 THE ROLE OF THE DAMAGES ISSUE WOULD BE, AND SO THAT YOU CAN KIND
21 OF GET YOUR ARMS AROUND THE 50,000 FOOT VIEW OF THE CASE.

22 THAT'S ALL I'M INTERESTED IN AT THIS POINT. I'M NOT
23 INTERESTED IN THE DETAILS OF, YOU KNOW, HOW A PARTICULAR PATENT
24 GOT INFRINGED OR WHATEVER.

25 BUT I THINK IT WOULD BE IMPORTANT FOR YOU TO SEE AND

1 HEAR SOME OF THE EXCELLENT LAWYERS THAT ARE REPRESENTING BOTH
2 SIDES IN THIS CASE AND MAYBE IT WOULD HELP YOU ALSO TO LEARN
3 SOMETHING ABOUT THE CASE ITSELF.

4 SO, MR. JACOBS, YOU ARE THE PLAINTIFF. YOU GET TO GO
5 FIRST.

6 **MR. JACOBS:** THANK YOU, YOUR HONOR.

7 GOOD MORNING, GENTLEMEN.

8 IN THE MIDDLE OF THE LAST DECADE, GOGGLE DECIDED TO
9 DEVELOP A PLATFORM FOR HANDSETS RECOGNIZING THAT, AS WE'VE ALL
10 COME TO KNOW, CARRYING AROUND A HANDSET, A MOBILE TELEPHONE,
11 WOULD BE THE OR AN IMPORTANT VEHICLE BY WHICH PEOPLE WOULD
12 ACCESS WEB SERVICES, INCLUDING GOOGLE SERVICES, INCLUDING GOOGLE
13 SEARCH, AND, THEREFORE, INCLUDING GOOGLE ADVERTISING, WHICH IS,
14 AFTER ALL, THE DRIVER OF GOOGLE'S REVENUES.

15 AND IN THAT PERIOD GOOGLE SET ABOUT DEVELOPING THIS
16 OPERATING SYSTEM AND BASING IT ON JAVA, WHICH WAS DEVELOPED BY
17 SUN, AND AS TO WHICH SUN HAS A RANGE OF INTELLECTUAL PROPERTY
18 RIGHTS, OR HAD A RANGE OF INTELLECTUAL PROPERTY RIGHTS.

19 IT HAD PATENTS. IT HAD COPYRIGHTS. IT HAD VARIOUS
20 LICENSING MECHANISMS. IMPORTANT TO SUN AND IMPORTANT TO THE
21 SUCCESS OF JAVA WAS MAINTAINING JAVA COMPATIBILITY. SO THE VERY
22 IDEA OF JAVA WAS: WE'RE GOING TO PUT THIS LAYER OF SOFTWARE ON
23 A VARIETY OF DEVICES OUT THERE IN THE WORLD, WHICH MAY OTHERWISE
24 BE INCOMPATIBLE WITH EACH OTHER. BUT BY PUTTING THIS LAYER ON
25 THERE WE'RE GOING TO CREATE COMPATIBILITY AND WE ARE GOING TO

1 ALLOW APPLICATIONS FROM A RANGE OF SOURCES TO RUN ON THIS
2 PLATFORM.

3 AND SO THE JAVA PLATFORM FEATURED THIS CAPABILITY
4 KNOWN AS "WRITE ONCE, RUN ANYWHERE."

5 GOOGLE DECIDED TO BASE ANDROID ON JAVA IN VARIOUS
6 WAYS AND ENGAGED SUN IN NEGOTIATIONS OVER A LICENSE THAT WOULD
7 PERMIT ANDROID'S DEVELOPMENT IN THE WAY THAT GOOGLE WANTED IT
8 DEVELOPED.

9 ANDROID, IN PARTICULAR, GOOGLE WANTED TO OPEN SOURCE
10 ANDROID IN ORDER TO GAIN RAPID MARKET PENETRATION TO MAKE IT
11 VERY INEXPENSIVE FOR THE HANDSET MAKERS TO ADOPT IT.

12 THOSE NEGOTIATIONS INCLUDED VARIOUS BIDS AND ASKS.
13 THE COURT'S ORDER ON THE DAUBERT MOTION THAT GOOGLE FILED ON OUR
14 EARLIER DAMAGE REPORT RECOUNTS SOME OF THAT NEGOTIATION AND SOME
15 OF THE BIDS AND ASKS DURING THAT TIME FRAME.

16 ONE OF THE ELEMENTS OF THE NEGOTIATIONS WAS WHETHER
17 SUN WOULD GAIN A SHARE OF THE ADVERTISING REVENUE THAT WOULD
18 ACCRUE TO GOOGLE ON ACCOUNT OF THIS EXPANSION OF THE MARKET FOR
19 GOOGLE ADS ON ACCOUNT OF THE IMPLEMENTATION OF ANDROID ON ALL OF
20 THESE HANDSETS.

21 ANOTHER ASPECT OF THE NEGOTIATION WAS HOW WOULD WE,
22 WE SUN, WOULD ENSURE THAT ANDROID WOULD PRESERVE THIS WRITE ONCE
23 RUN ANYWHERE CAPABILITY FOR JAVA.

24 THE NEGOTIATIONS FAILED. THERE WERE SEVERAL ROUNDS
25 OF SUCCESS. THERE WERE SEVERAL SUCCESSIVE ROUNDS OF

1 NEGOTIATIONS. THEY FAILED, AS WELL.

2 ORACLE BOUGHT SUN. ACQUIRED, THEREFORE, THE
3 INTELLECTUAL PROPERTY ASSOCIATED WITH JAVA. JAVA WAS THE
4 FLAGSHIP AND COUNTED AS THE FLAGSHIP PRODUCT LINE OR ASPECT OF
5 SUN DURING THE ACQUISITION.

6 ANDROID HAS BEEN A PHENOMENAL SUCCESS. GOOGLE'S
7 BUSINESS STRATEGY FROM THE BUSINESS STANDPOINT HAS BEEN
8 EXTREMELY PROFITABLE FOR GOOGLE. DEVELOP AN OPERATING SYSTEM,
9 THAT'S ENGINEERING COSTS DISSEMINATED FOR FREE. HANDSET MAKERS
10 ADOPT IT. ADVERTISING REVENUE IN THE BILLIONS OF DOLLARS
11 ASSOCIATED WITH ANDROID AND ITS -- AND THE INCREMENTAL
12 ADVERTISING REVENUE HAS ENURED TO GOOGLE ON ACCOUNT OF IT.

13 ANDROID IS NOW PROLIFERATING INTO OTHER DEVICES, SO
14 PRESUMABLY THE REVENUE MODEL GOES BEYOND HANDSETS AND INTO OTHER
15 SPACES.

16 AFTER THE FAILURE OF A ROUND OF NEGOTIATIONS BETWEEN
17 ORACLE AND GOOGLE, ORACLE SUED FOR PATENT INFRINGEMENT AND FOR
18 COPYRIGHT INFRINGEMENT. THE PATENT INFRINGEMENT RELATES TO
19 SEVEN PATENTS.

20 THE PARTIES HOTLY DISPUTE THE SIGNIFICANCE OF THESE
21 PATENTS. BUT THE EVIDENCE WE WILL BE PRESENTING WILL BE THAT
22 THESE PATENTS ARE VERY IMPORTANT TO THE COMMERCIAL SUCCESS OF
23 ANDROID BECAUSE THEY GO TO THINGS THAT USERS CARE A LOT ABOUT:
24 DOES MY HANDSET PERFORM VERY WELL? DO THE APPLICATIONS MOVE UP
25 QUICKLY? DO THEY RUN SMOOTHLY? CAN I RUN A LOT OF

1 APPLICATIONS? IN ANDROID, YOU CAN MULTITASK. YOU CAN RUN
2 MULTIPLE APPLICATIONS SIMULTANEOUSLY. THAT'S ONE OF THE
3 DIFFERENTIATORS OF ANDROID.

4 DO I HAVE THE ABILITY TO HAVE GOOD SECURITY ON MY
5 HANDSET? SO WE WILL BE PRESENTING A LOT OF EVIDENCE ABOUT THESE
6 PATENTS. NOT ONLY THAT THEY ARE INFRINGED, INFRINGED BY ANDROID
7 ON HANDSETS, INFRINGED BY ANDROID BEING DISTRIBUTED, ET CETERA,
8 BUT THAT THEY ARE QUITE VALUABLE.

9 THE COPYRIGHT ISSUE IS THAT GOGGLE, HAVING STARTED
10 OUT ON THIS PATH OF ADOPTING JAVA, THEN DEPARTED FROM THE JAVA
11 MODEL. IT DID NOT COMPLY WITH THE WRITE ONCE, RUN ANYWHERE
12 REGIME ASSOCIATED WITH JAVA.

13 THAT, TOO, IS ONE OF THE INJURIES THAT WE WILL BE
14 COUNTING ON THE PATENT SIDE AS WE TALLY UP OUR DAMAGES. THE
15 JAVA PLATFORM HAS NOW BEEN FRAGMENTED BECAUSE GOOGLE PARTIALLY
16 ADOPTED JAVA. THEY ADOPTED JAVA PROGRAMMING LANGUAGE. AND MOST
17 IMPORTANTLY FOR PURPOSES OF OUR COPYRIGHT CLAIM THEY ADOPTED
18 AND IMPLEMENTED BOTH APPLICATION PROGRAM INTERFACES AND CODE FOR
19 EXTENSIONS TO THE JAVA PLATFORM CALLED "CLASS LIBRARIES." 37 OF
20 THEM ARE IN DISPUTE.

21 AND THEY, TOO, WERE EXTREMELY VALUABLE TO GOGGLE. IN
22 FACT, ON THIS POINT THE PARTIES ARE NOT IN DISPUTE. GOOGLE'S
23 EXPERT SAYS THIS WAS ESSENTIALLY TO GAIN EARLY ADOPTION OF
24 ANDROID, BECAUSE THEY GAINED ACCESS TO THE JAVA COMMUNITY, THE
25 JAVA DEVELOPER COMMUNITIES, 6.5 MILLION OF THEM, OR SOMETHING

1 LIKE THAT. BY PARTIALLY ADOPTING JAVA, AND THEN FRAGMENTING IT
2 AWAY FROM JAVA, THEY THREATENED THE VERY ESSENCE OF THE JAVA
3 MODEL, THE JAVA PLATFORM, THE JAVA PROMISE.

4 SO IN THE -- SO THE COPYRIGHT CLAIM AND THE DAMAGES
5 CALCULATIONS, THE DAMAGES METHODOLOGIES ARE DIFFERENT FOR PATENT
6 AND COPYRIGHT, AS YOU PROBABLY KNOW.

7 THE COPYRIGHT CLAIM RELATES TO THESE 37 API'S THAT
8 WERE IMPLEMENTED AND SOME OTHER EVIDENCE THAT WE HAVE OF REALLY
9 LINE FOR LINE COPYING IN WHAT ARE CALLED THE "JAVA CORE
10 LIBRARIES."

11 IF YOU GO TO THE ANDROID WEBSITE AND YOU LOOK AT THE
12 DESCRIPTION OF ANDROID, IT SAYS:

13 "WE OFFER THESE JAVA CODE LIBRARIES."

14 IF YOU LOOK AT THE ANDROID CORE LIBRARIES, THEY SAY:
15 "JAVA DOT, LINE DOT."

16 SO, IN ESSENCE, THEN, FROM THE DAMAGES STANDPOINT, WE
17 HAVE AN ENORMOUSLY SUCCESSFUL BUSINESS MODEL. IT DOESN'T
18 CONFORM TO THE TRADITIONAL DAMAGES CALCULATIONS BECAUSE ANDROID
19 IS NOT SOLD FOR A PRICE AS TO WHICH WE CAN ATTACH A PERCENTAGE
20 ROYALTY. AND THEREIN, I THINK, LIES THE INTERESTING CHALLENGE
21 FOR DAMAGES EXPERTS ON BOTH SIDES IN THIS CASE: HOW DO WE
22 CALCULATE AN APPROPRIATE COMPENSATION, ASSUMING LIABILITY, FOR
23 ORACLE AMERICA WHEN THE REVENUE MODEL IS NOT SELL ON A PER
24 DOLLAR CHARGE, BUT IS RATHER GENERATE ADVERTISING REVENUE.

25 INITIALLY, GOOGLE TOOK THE POSITION THAT THERE IS NO

1 DAMAGES BASE.

2 THE COURT'S DAUBERT RULING REJECTS THAT. SO WE'RE
3 INTO THE WORLD NOW OF CALCULATING DAMAGES BASED ON ADVERTISING
4 REVENUE. AND THE ISSUE IS, IN A NUTSHELL, HOW MUCH?

5 AND AMONG THE HOTLY DISPUTED ISSUES WILL BE THE VALUE
6 OF THESE PATENTS AND HOW YOU CALCULATE OR ATTRIBUTE DAMAGES TO
7 THESE PATENTS GIVEN THEIR ROLE IN ANDROID, THE IMPLICATIONS OF
8 THE COPYRIGHT INFRINGEMENT. WE WILL DO WHAT YOU NORMALLY DO IN
9 COPYRIGHT DAMAGES, WHICH IS PUT FORTH THE KIND OF REVENUE BASE.
10 AND THEN, THERE WILL BE APPORTIONMENT ISSUES.

11 SO I THINK THAT BOTH GIVES YOU OUR VIEW THAT WE'RE
12 ENTITLED TO VERY SUBSTANTIAL COMPENSATION BASED ON THE KIND OF
13 HISTORY OF THE NEGOTIATIONS OF THE PARTIES, THE ENORMOUS SUCCESS
14 OF ANDROID, THE FACT OF THE TAKING, IF YOU WILL, THE STRATEGIC
15 DECISION TO BASE ANDROID ON JAVA, BUT FRAGMENT JAVA.

16 WE WILL BE SEEKING VERY LARGE COMPENSATION FOR ORACLE
17 AMERICA ARISING OUT OF THAT INFRINGEMENT.

18 **THE COURT:** ALL RIGHT. THANK YOU, MR. JACOBS.

19 MR. VAN NEST.

20 **MR. VAN NEST:** GOOD MORNING, YOUR HONOR. IT'S ALWAYS
21 EXCITING TO COME IN. JUDGE ALSUP ALWAYS HAS LOTS OF SURPRISES
22 FOR US, AND THIS IS ONE.

23 AS I SAID EARLIER, I WANT TO THANK BOTH OF YOU FOR
24 COMING OUT AND PARTICIPATING THIS MORNING.

25 THE SHORT STORY FROM GOOGLE'S STANDPOINT IS THAT

1 EVERYBODY WAS CHASING THE SMART PHONE MARKET. WE ALL HAVE OUR
2 BLACKBERRIES. YOU KNOW WHAT IPHONE IS. BACK THEN THAT MARKET
3 WAS NOT YET DEVELOPED.

4 AND GOOGLE HAD A COUPLE OF OPTIONS IN COMING UP WITH
5 SMART PHONE. THEY COULD BUILD THEIR OWN. THEY HAD A BIG
6 ENGINEERING STAFF THAT RAN AND BUILT GOOGLE. THEY COULD GO OUT
7 AND PARTNER WITH SOMEBODY AND BUILD IT TOGETHER.

8 SO THEY HAD AN INTERNAL STAFF. THEY WERE WORKING ON
9 SMART PHONE. THEY HAD A SERIES OF MEETINGS. THEY LOOKED AT A
10 LOT OF DIFFERENT COMPANIES. THEY TALKED TO MANY DIFFERENT
11 POTENTIAL PARTNERS, INCLUDING SUN. AND SUN HAD JAVA.

12 JAVA, IT'S IMPORTANT TO UNDERSTAND, IS A LOT
13 DIFFERENT THINGS. WE SAY "JAVA" AS THOUGH IT'S ONE THING, BUT
14 IT'S LOTS OF COMPONENTS.

15 IT'S A PROGRAMMING LANGUAGE LIKE C OR C PLUS. IT'S
16 OPEN. ANYBODY CAN USE IT. THERE'S NO DISPUTE IN THIS CASE THAT
17 JAVA PROGRAMMING LANGUAGE, FREE FOR ANYBODY TO USE, AND JUDGE
18 ALSUP HAS ALREADY ACKNOWLEDGED THAT.

19 THERE ARE JAVA CODE LIBRARIES MR. JACOBS REFERRED TO.
20 THERE IS A JAVA VIRTUAL MACHINE. THERE ARE LOTS OF DIFFERENT
21 STYLES OF JAVA VIRTUAL MACHINES BECAUSE JAVA IS AN OPEN SOURCE
22 SYSTEM.

23 SO GOOGLE HAD A VARIETY OF OPTIONS FOR WRITING THIS
24 CODE. COULD HAVE USED C PLUS. COULD HAVE USED C. COULD HAVE
25 USED JAVA. TALKED TO A LOT OF DIFFERENT VENDORS. HAD A SERIES

1 OF DISCUSSIONS WITH SUN. AND AS MR. JACOBS MENTIONED, THOSE
2 DISCUSSIONS WERE ALONG THE LINES OF A TECHNOLOGY PARTNERSHIP.
3 THE IDEA WAS WE, GOOGLE, HAVE THIS ANDROID PROJECT. WE HAVE
4 ENGINEERS WORKING ON IT. WE'D LIKE TO WORK WITH YOU GUYS AT
5 SUN, AND BRING YOUR ENGINEERS TO THE TABLE. LET'S BUILD A PHONE
6 TOGETHER.

7 THEY HAD A SERIES OF DISCUSSIONS IN '05, IN '06.
8 THOSE ULTIMATELY FAILED. AND THEY FAILED, REALLY, BECAUSE MORE
9 OF BUSINESS ISSUES THAN OF MONEY.

10 GOOGLE AND SUN DISCUSSED A NUMBER OF FINANCIAL
11 MODELS. AT ONE POINT SUN ASKED FOR A HUNDRED MILLION DOLLARS AS
12 PART OF THIS TECHNOLOGY PARTNERSHIP.

13 GOOGLE SAID: "NO, THAT'S TOO EXPENSIVE."

14 SEVERAL MONTHS LATER THE NUMBER WENT DOWN. SEVERAL
15 MONTHS LATER IT WENT DOWN AGAIN.

16 IT FINALLY GOT DOWN TO ABOUT \$26 MILLION, AND GOOGLE
17 SAID: "NO, THAT'S TOO MUCH. I MEAN, THIS IS AN EQUAL
18 PARTNERSHIP. WE'RE BOTH GOING TO MAKE MONEY OTHER WAYS THAN
19 CHARGING FOR ANDROID. WE'RE GOING TO MAKE IT ON OTHER TYPES OF
20 SERVICES THAT WE EACH PROVIDE."

21 INTERESTING THING. WE'VE HAD THE OPPORTUNITY TO
22 DEPOSE SOME OF THE BIG PLAYERS IN THE INDUSTRY.

23 JONATHAN SCHWARTZ WAS DEPOSED. USED TO BE THE CEO OF
24 SUN.

25 LARRY ELLISON WAS DEPOSED.

1 MR. SCHWARTZ TESTIFIED THAT GIVEN WHAT HE KNEW AND
2 GIVEN WHAT HE THOUGHT WAS GOING TO BE THE SUCCESS OF ANDROID, HE
3 WOULD HAVE PAID MONEY, PAID MONEY TO GOOGLE HAD THEY BEEN ABLE
4 TO COME TO BUSINESS TERMS IN ORDER TO GET A DEAL AND BE PART OF
5 THE ANDROID FAMILY.

6 THAT DIDN'T HAPPEN. ANDROID WAS RELEASED. WHEN IT
7 WAS RELEASED IN '07, SCHWARTZ AND SUN SAID: "WELCOME, ANDROID,
8 TO THE JAVA COMMUNITY. WE LOVE HAVING YOU. YOU'RE A ROCKET
9 THAT'S GOING TO TAKE JAVA HIGHER."

10 THEY WERE HAPPY THAT ANDROID HAD ADOPTED JAVA, THE
11 PROGRAMMING LANGUAGE. AND THEY WERE HAPPY TO HAVE IT AS PART OF
12 THE GROUP.

13 WHEN MR. ELLISON BOUGHT THE COMPANY IN 2009, HE, TOO,
14 SAID: "I'M FLATTERED THAT ANDROID IS USING JAVA. WE'RE
15 FLATTERED TO HAVE ANDROID USING IT BECAUSE WE WANT JAVA TO BE
16 EVERYWHERE."

17 NOW, WHAT'S IMPORTANT TO UNDERSTAND IS YOU GUYS WON'T
18 BE ASKED TO DECIDE INFRINGEMENT. BUT JUST SO YOU KNOW IT, WE
19 ACKNOWLEDGE THAT WE USED THE JAVA PROGRAMMING LANGUAGE. WE
20 WROTE OUR OWN CODE LIBRARIES. WE WROTE OUR OWN VIRTUAL MACHINE
21 WE DO NOT INFRINGE THE JAVA PATENTS.

22 THESE JAVA PATENTS THAT ARE STILL IN THE CASE ARE
23 SEVEN. THEY AFFECT TWO OR THREE AREAS OF JAVA BUT, IN EFFECT,
24 THEY ARE TWEAKS, IMPROVEMENTS. A NUMBER OF THEM WERE NEVER USED
25 IN JAVA ITSELF. THEY WERE SIMPLY INVENTIONS. THE INVENTORS

HAVE TESTIFIED THAT THEY WERE NEVER IMPLEMENTED, NEVER USED.

SOME OF THEM PERTAIN TO CODE THAT WAS NEVER INCLUDED IN EITHER JAVA OR ANDROID. SO THERE'S A HOT DEBATE ABOUT THE IMPORTANCE OF THESE AND A HOT DEBATE ABOUT THE SIGNIFICANCE OF THEM.

ORACLE CAME IN WITH AN EXPERT REPORT. IT WAS A MULTI BILLION DOLLAR REPORT. IT WAS ALONG THE LINES OF WHAT MR. JACOBS SAID: ALL THIS ADVERTISING REVENUE AND THE LIKE.

WE FILED A MOTION TO STRIKE IT. JUDGE ALSUP STRUCK IT. AND HE LAID OUT A ROADMAP. NOW, THE ROADMAP THAT HE LAID OUT, WHICH IS AN ORDER THAT YOU GENTLEMEN WILL HAVE AN OPPORTUNITY TO READ ESSENTIALLY SAYS: "HEY, YOU GOT TO TIE THE VALUE TO THESE PATENTS. WE'RE NOT TALKING ABOUT ALL THE JAVA. WE'RE TALKING ABOUT THESE SPECIFIC PATENTS? YOU HAVE TO TIE THERE LIKE WE DO IN EVERY OTHER CASE."

WE ALL KNOW THE CASE LAW IN THIS AREA. AND SO THIS EXPERT DIDN'T DO THAT. AND A NEW EXPERT HAS GOT TO DO IT. AND WHAT JUDGE ALSUP SUGGESTED, WHICH WE THINK IS A GOOD IDEA, IS LOOK BACK AT WHAT WAS THE NEGOTIATION BETWEEN THE PARTIES? WHAT WERE THE FACTORS THEY HAD IN MIND?

AND CERTAINLY ADVERTISING REVENUE, AT LEAST ON MOBILE DEVICES, WAS ONE OF THE THINGS THAT GOOGLE WAS LOOKING FOR, NO DOUBT ABOUT THAT.

ONE OF THE THINGS SUN WAS LOOKING FOR WAS GREATER
NOTORIETY FOR JAVA AND A GREATER BOOST FOR JAVA.

1 SO WE HAVE A RECORD OF ACTUAL NEGOTIATIONS WHICH
2 FAILED AT AROUND \$26 MILLION. WHAT JUDGE ALSUP SUGGESTED WAS
3 TAKE A LOOK AT THOSE NEGOTIATIONS. START THERE AND ADJUST UP OR
4 DOWN, DEPENDING ON WHAT OTHER FACTORS MAY COME INTO PLAY.

5 THOSE NEGOTIATIONS WERE FOR THE ENTIRETY, ALL THE
6 JAVA LIBRARIES, THE JAVA VIRTUAL MACHINE. ALL OF JAVA, NOT JUST
7 THESE SEVEN REMAINING PATENTS. AND THERE WOULD BE FACTORS FOR
8 ACCOUNTING. BUT WHAT WE THINK ONE OF THE MOST FACTORS IS WHAT
9 THE PARTIES ACTUALLY SAID AND DID.

10 JONATHAN SCHWARTZ WAS RUNNING SUN. ANDY RUBIN WAS
11 RUNNING THE ANDROID PROJECT AT GOOGLE. THERE'S A GOOD RECORD OF
12 WHAT THEY SAID TO EACH OTHER AND HOW THIS CAME ABOUT.

13 MR. SCHWARTZ HAS TESTIFIED ABOUT IT. MR. RUBIN HAS
14 TESTIFIED ABOUT IT. SO THERE'S A VERY GOOD RECORD TO WORK FROM.
15 AND WE LOOK FORWARD TO WORKING WITH WHICHEVER ONE OF YOU
16 GENTLEMEN IS SELECTED. AND, AGAIN, THANKS VERY MUCH FOR BEING
17 HERE THIS MORNING.

18 **THE COURT:** ALL RIGHT. THANK YOU. WELL, YOU BOTH
19 DID A GREAT JOB WITH NO NOTICE. SO THANKS FOR RISING TO THE
20 OCCASION.

21 LET ME GIVE YOU A WORD OR TWO ABOUT WHAT THE
22 ASSIGNMENT WOULD BE. IT WOULD NOT BE BEING LIKE A LAW CLERK TO
23 ME. SOMETIMES JUDGES DO HAVE AN EXPERT COME IN TO ADVISE THE
24 JUDGE CONFIDENTIALITY. THAT'S NOT WHAT I HAVE IN MIND.

25 IN FACT, I DON'T WANT TO YOU GIVE ME -- YOU WOULD BE

1 TESTIFYING BEFORE THE JURY TO GIVE THE JURY YOUR BEST
2 PROFESSIONAL OPINION. AND I WOULD MOST LIKELY SAY TO THE JURY TO
3 EXPLAIN WHY YOU'RE THERE, THAT THE COURT HAS APPOINTED YOU AND
4 THAT NOT TO GIVE YOUR WEIGHT -- YOUR OPINION ANY MORE WEIGHT ON
5 THAT ACCOUNT. BUT BY WAY OF EXPLANATION WHY THERE ARE THREE
6 EXPERTS INSTEAD OF JUST TWO.

7 SO YOU WOULD NOT BE MY LAW CLERK OR MY SPECIAL
8 ADVISOR. YOU WOULD BE APPEARING IN THIS SPECIAL ROLE THAT RULE
9 706 OF THE FEDERAL RULES OF EVIDENCE ALLOWS FOR.

10 WE WOULD WANT YOUR INDEPENDENT JUDGMENT, PROFESSIONAL
11 JUDGMENT. YOU WOULD NOT BE A MEDIATOR. I WOULD NOT WANT YOU
12 TO -- IN FACT, I WOULD SAY TO YOU IN YOUR WRITTEN INSTRUCTIONS
13 THAT YOU ARE NOT TO VIEW YOURSELF AS SOME KIND OF MEDIATOR TO
14 SAY:

15 "WELL, OKAY. ONE SIDE WANTS X. THE OTHER SIDE
16 WANTS Y. WE WILL SPLIT THE DIFFERENCE," OR SOMETHING
17 LIKE THAT. ONE SIDE MAY BE TOTALLY RIGHT. BOTH SIDES MAY BE
18 TOTALLY WRONG. YOU MAY THINK A PARTICULAR ITEM IS WORTH ZERO.

19 WHEREAS, THE OTHER TWO SIDES WOULD SAY IT'S WORTH
20 SOMETHING. IN OTHER WORDS, YOU'RE NOT THERE TO SPLIT THE
21 DIFFERENCE OR TO MEDIATE. YOU ARE THERE TO GIVE YOUR OWN
22 PROFESSIONAL OPINION AND, OF COURSE, AS WELL TO CRITIQUE WHAT
23 THE TWO OTHER EXPERTS HAVE DONE.

24 NOW, THAT COMES TO: WHAT HAVE THEY DONE? I KNOW YOU
25 ARE THINKING: WHAT IS THE STATUS OF THIS CASE?

1 DO WE EVEN HAVE THE PLAINTIFF'S EXPERT REPORT YET?

2 NOT YET, I THINK. WHEN IS IT GOING TO BE DUE? 35

3 DAYS BEFORE THE PRETRIAL CONFERENCE, RIGHT?

4 **MR. HOLTZMAN:** THAT WILL BE SEPTEMBER 12.

5 **THE COURT:** SO SEPTEMBER 12, COUPLE WEEKS FROM NOW,
6 WE WILL HAVE THE OPENING REPORT.

7 AND THEN, WHEN IS YOUR REPORT GOING TO BE DUE?

8 **MR. VAN NEST:** I BELIEVE IT'S DUE OCTOBER 4TH, YOUR
9 HONOR, TWO WEEKS BEFORE THE PRETRIAL.

10 **THE COURT:** ALL RIGHT. AND THEN, THE TRIAL ITSELF IS
11 OCTOBER 31.

12 NOW, AS A FOOTNOTE ON THAT, MY 12 YEARS ON THIS JOB I
13 HAVE DONE OVER A HUNDRED TRIALS. ONLY TWO OF THOSE EVER HAD TO
14 SLIP. BY "SLIP" I MEAN 98 OF THEM WENT TO TRIAL TO THE MINUTE
15 THAT I HAD SET. THIS CASE, THOUGH, I CANNOT PROMISE YOU THAT.

16 EVEN IF THE LAWYERS ARE TOTALLY READY, WHICH I THINK
17 THEY WILL BE, I HAVE A MASSIVE CRIMINAL CASE THAT IS NOW -- THE
18 FIRST PART OF WHICH THE JURY IS DELIBERATING ON RIGHT NOW IN
19 ANOTHER COURTROOM.

20 AND THE SECOND PART WHICH IS SET TO START ON
21 OCTOBER 16TH. IF THAT CASE GOES ON OCTOBER 16TH, I CANNOT TRY
22 THIS CASE ON OCTOBER 31. IT WOULD BE ANOTHER THREE TO FOUR
23 MONTH. THIS ONE WAS SIX MONTHS. THAT ONE WILL BE THREE OR FOUR
24 MONTHS.

25 AND THE CRIMINAL CALENDAR MUST TAKE PRIORITY UNDER

1 THE SPEEDY TRIAL ACT. SO THAT IS A TOTAL QUESTION MARK. I DON'T
2 KNOW WHERE THAT COMES OUT. BUT RIGHT NOW THE SCHEDULE IS
3 OCTOBER 31.

4 YES, SIR EXPERT.

5 **MR. DEGEN:** AS I EXPLAINED TO COUNSEL WHEN THEY
6 CONTACTED ME, I HAVE COMMITMENTS THE WEEK OF THE 14TH IN
7 NOVEMBER AND THE WEEK OF THE 21ST OF NOVEMBER. SO IF THIS
8 DOESN'T SLIP I'M PRETTY CONFLICTED.

9 **THE COURT:** YES. WELL, ALL RIGHT. I'M NOT GOING TO
10 SAY THAT'S A DEAL-KILLER YET, BECAUSE I DON'T KNOW THAT IT'S A
11 DEAL-KILLER YET. SO LET'S WAIT. LET'S WAIT.

12 **MR. DEGEN:** OKAY.

13 **THE COURT:** BUT YOU ARE RIGHT TO BRING THAT UP.

14 ALL RIGHT. SO THAT IS OUR PRESENT SCHEDULE, AND THESE
15 LAWYERS HAVE BEEN WORKING VERY HARD TO STAY ON IT. AND SO HAVE
16 WE, TO BE HONEST. I WON'T SAY HOW HARD I'VE BEEN WORKING, BUT
17 I'VE BEEN WORKING VERY HARD TO GET THE ORDERS OUT IN THIS CASE
18 EVEN THOUGH I'VE BEEN EMBROILED IN THIS LARGE CRIMINAL GANG
19 CASE.

20 SO WE'RE HOPING THAT OCTOBER 31 WE'LL GO. THE TRIAL
21 IS SUPPOSED TO BE THREE WEEKS LONG. IT WILL INVOLVE SEVEN
22 PATENTS. AND PLAINTIFF'S COUNSEL SAYS THEY ARE GOING TO GET IT
23 DOWN TO A TRIABLE NUMBER.

24 ALL RIGHT. HERE'S WHAT I THINK SOME OF THE FACTORS
25 WOULD BE OF IMPORTANCE TO THE COURT. I WOULD WANT YOU TO DO THE

1 WORK AND NOT UNDERLINGS. I CAN'T SAY THAT YOU COULDN'T DELEGATE.

2 I WORK ALLOW YOU TO DELEGATE SOME MINOR MINISTERIAL
3 THINGS TO AN ASSISTANT. BUT I KNOW HOW THESE LARGE COMPANIES
4 LIKE YOURS WORK. IT KIND OF ALL FILTERS UP TO THE TOP. AND
5 WHEN YOU GO IN TO TESTIFY, I WANT YOU TO BE THOROUGHLY VERSED IN
6 IT. AND SO I WOULD WANT YOU TO MINIMIZE ASSISTANTS AND MAXIMIZE
7 YOUR OWN, YOU KNOW, BRAIN POWER ON THE PROJECT.

8 I WOULD WANT YOU TO READ AND CRITIQUE THE TWO
9 REPORTS. IN ORDER FOR YOU TO DO THAT YOU ARE GOING TO HAVE TO
10 KNOW A LOT OF MATERIAL. YOU WOULD HAVE TO GET THAT MATERIAL FROM
11 THE LAWYERS, AND REVIEW AND ANALYZE IT YOURSELF.

12 YOU COULD READ THAT -- I'LL GIVE YOU A COPY OF THAT
13 ORDER THAT I PUT OUT, BUT BOTH SIDES WON SOME POINTS IN THAT.
14 AND IT REALLY IS JUST A STARTING POINT FOR DOING A MORE FINAL
15 ANALYSIS THAT YOU WOULD BE EXPECTED TO DO.

16 BUT I WOULD WANT YOU TO CRITIQUE BOTH SIDE'S REPORTS
17 FOR THE JURY, AND THEN GIVE YOUR OWN INDEPENDENT VIEW OF WHAT
18 THE RIGHT ANSWER IS OR A RANGE OF WHAT THE RIGHT ANSWER COULD
19 BE. AND GIVE GUIDANCE TO THE JURY SO THAT THEY WILL HAVE SOMEONE
20 WHO IS NOT A COMPLETE ADVOCATE, BUT IS SOMEONE WHO IS MORE
21 DETACHED AND TO EXPLAIN TO THE JURY, YOU KNOW: "HERE ARE SOME
22 OF THE CONSIDERATIONS. THESE ARE MORE IMPORTANT. THESE ARE LESS
23 IMPORTANT. HERE ARE SOME RANGES."

24 WHAT THE INTERCONNECTIONS ARE BETWEEN FACTOR A AND
25 FACTOR B.

1 SO THAT'S THE GENERAL DESCRIPTION OF THE ASSIGNMENT.

2 I THINK THAT YOU -- BOTH SIDES, OF COURSE, AT TRIAL
3 WOULD CROSS-EXAMINE YOU. THAT'S FINE. AND BOTH SIDES WOULD TAKE
4 YOUR DEPOSITION BEFORE THE TRIAL STARTED.

5 I THINK IT WOULD BE A GOOD IDEA IF YOU WANTED TO, BUT
6 THIS ONE I WOULD WANT TO MAKE SURE THAT EVERYONE AGREED TO IT,
7 THAT YOU WOULD -- YOU COULD INTERVIEW THE OTHER EXPERTS WITHOUT,
8 YOU KNOW, OFF THE RECORD. NOT "OFF THE RECORD." I MEAN, WITHOUT
9 IT BEING RECORDED IS WHAT I MEAN. IT COULD BE -- BUT YOU MIGHT
10 READ THEIR REPORT, ASK THEM QUESTIONS, BOTH SIDES. SEE IF THERE
11 ARE AMBIGUITIES, GET THOSE CLARIFIED. ASK FOR THE BACKUP ON
12 SOMETHING.

13 IF THAT IN YOUR OWN PROFESSIONAL OPINION WOULD BE
14 SOMETHING THAT WOULD BE USEFUL TO YOU, THEN I WOULD WANT TO TRY
15 TO MAKE THAT HAPPEN.

16 AGAIN, THOUGH, IT WOULD NOT BE A MEDIATION. THIS IS
17 NOT A MEDIATION. AND THE TIMES THAT I'VE DONE THIS IN THE PAST I
18 HAVE ASKED -- I'M GOING TO ASK YOU AFTER YOU LEAVE TODAY TO SEND
19 ME A LETTER EXPLAINING WHAT YOU THINK OF THIS PROCESS, WHETHER
20 YOU'RE WILLING TO DO IT, AND IF SO, AT WHAT PRICE AND HOW YOU
21 WOULD STAFF IT, WHICH I HOPE THE ANSWER IS 90 PERCENT YOU AND
22 TEN PERCENT SOMEBODY ELSE. OR 80 PERCENT YOU AND 20 PERCENT
23 SOME ASSISTANT, AND WHAT THE STRUCTURE WOULD BE.

24 I HOPE YOU WILL REMEMBER THAT TO AVOID THE APPEARANCE
25 THAT THE COURT HAS TURNED THIS INTO A BOONDOGGLE FOR SOMEBODY, I

1 WOULD PREFER THAT YOUR BILLING RATE BE A LITTLE LESS THAN YOU
2 NORMALLY WOULD BILL.

3 SO YOU THINK ABOUT THAT. I WOULDN'T REQUIRE IT. IT'S
4 JUST A FACTOR THAT I WOULD LIKE TO TAKE INTO ACCOUNT. SO WITH
5 THAT BACKGROUND -- OH, ONE OTHER THING. YOU KNOW, IF YOU HAD
6 DONE -- IF YOU HAD TESTIFIED BEFORE OR PREPARED REPORTS BEFORE
7 THAT YOU THINK WOULD COMPROMISE YOUR FREEDOM OF MOVEMENT, IN
8 OTHER WORDS, IF YOU HAVE ALREADY BOXED YOURSELF IN BY
9 REPRESENTING SOMEBODY IN A PATENT CASE WHERE YOU TOOK A POSITION
10 THAT IS GOING TO BE HARD TO EXPLAIN IN THIS CASE AND HAS SORT OF
11 COMMITTED YOU TO A POSITION, I THINK I SHOULD KNOW ABOUT THAT
12 NOW.

13 SO IF YOU -- IF ANYTHING COMES -- MAYBE IT WOULD BE
14 UNFAIR TO ASK YOU ON THE SPOT. BUT YOU WOULD NEED TO DISCLOSE
15 THAT TO ME IN A LETTER BECAUSE YOU CAN SEE HOW IF YOU WERE TO
16 TAKE A POSITION, YOU KNOW, X, Y, Z, BUT TWO YEARS AGO IN A
17 DIFFERENT PATENT CASE YOU TOOK "NO" TO X, Y, Z, YOU WOULD BE
18 IMPEACHED FOR THAT.

19 AND SO I AM LOOKING FOR SOMEBODY WHO IS
20 UNIMPEACHABLE. YOU KNOW, AT LEAST UNIMPEACHABLE WITH PRIOR
21 INCONSISTENT STATEMENTS.

22 THAT'S WHAT I'M LOOKING FOR. IF YOU TOLD ME THAT
23 YOU COULD DO IT, BUT IT MIGHT BE -- YOU MIGHT NEED AN EXTRA
24 MONTH, I WOULD CONSIDER MOVING THE TRIAL A MONTH TO ACCOMMODATE
25 YOU. BUT I PROBABLY WOULD NOT DO IT FOR THAT REASON ALONE. IT

1 MIGHT HAVE TO BE IN COMBINATION WITH OTHER CALENDAR PROBLEMS
2 THAT I HAVE.

3 BUT IT WOULD BE AN IMPORTANT FACTOR TO TAKE INTO
4 ACCOUNT.

5 YES, SIR.

6 **MR. DEGEN:** I'M NOT FAMILIAR WITH THE RANGE OF
7 DOCUMENTS THAT HAVE BEEN PRODUCED IN THIS CASE, BUT ON THE KIND
8 OF SCHEDULE THAT YOU'RE TALKING ABOUT I WOULD BE FORCED TO
9 ESSENTIALLY RELY ON THE DOCUMENT SYNTHESIS THAT'S IN THE TWO
10 OPPOSING REPORTS THAT ARE BEFORE YOU. AND I HEAR YOU SAYING YOU
11 DON'T WANT A MEDIATOR.

12 BUT IN THE LIMITED TIME AVAILABLE IT WOULD BE
13 ESSENTIALLY IMPOSSIBLE TO COMPLETE A DE NOVO REVIEW OF ALL
14 UNDERLYING DOCUMENTS, ESPECIALLY WITHOUT CONSIDERABLE
15 ASSISTANCE.

16 SO WOULD YOU BE COMFORTABLE WITH THE NOTION THAT THE
17 FACTS EITHER OF US WOULD BE WORKING WITH WOULD BE TO A LARGE
18 EXTENT THE FACTS THAT EITHER SIDE HAS BROUGHT FORTH IN THEIR
19 REPORTS, OR, YOU KNOW, THE MAIN DOCUMENTS THAT THEY ARE CITING?

20 **THE COURT:** THAT'S A POSSIBILITY. WELL, YOU KNOW,
21 THAT WOULD -- IT MAY BE THAT THE EXPERTS HAVE A UNIVERSE OF
22 MATERIALS THAT THEY THEMSELVES REVIEWED. AND THEN, YOU COULD
23 REVIEW THE SAME UNIVERSE THAT THEY REVIEWED, WHICH WOULD NOT BE
24 THE ENTIRE UNIVERSE OF THE ENTIRE CASE, I ASSUME. I DON'T KNOW.

25 HAVE THE EXPERTS REVIEWED EVERY DOCUMENT IN THE CASE?

1 WHAT IS THE UNIVERSE THAT THE EXPERTS HAVE LOOKED AT SO FAR?

2 **MR. HOLTZMAN:** ON OUR SIDE, YOUR HONOR, THE EXPERTS
3 HAVE HAD FULL ACCESS. THOSE HAVE BEEN PRODUCED. WHAT
4 PERCENTAGE OF THAT IS VERY LARGE NUMBER. WHAT THEY HAVE ARRIVED
5 ON IS A LITTLE HARD TO SAY. AND, OF COURSE, IT'S A SYNTHESIS.

6 **THE COURT:** WOULD IT BE MORE THAN FIVE OR SIX BOXES
7 FULL OF DOCUMENTS?

8 **MR. HOLTZMAN:** I THINK UNLIKELY. AND THEY ARE LONG
9 LISTS. IT'S BEEN IN THEIR REPORT, TOO, BUT IN OUR REPORT AS
10 WELL AS TO THE CASE. AND THE INITIAL REPORT MADE IS A VERY LONG
11 LIST OF DOCUMENTS RELIED ON. GOES ON FOR SEVERAL PAGES OF
12 DOCUMENT PRODUCTION NUMBERS. BUT I THINK IT WOULD PROBABLY BE
13 MORE THAN FIVE OR SIX BOXES.

14 **MR. PURCELL:** I THINK THE SAME IS TRUE FOR US, YOUR
15 HONOR. I THINK FIVE BOXES IS PROBABLY A GOOD BALLPARK. AND, OF
16 COURSE, THERE HAVE BEEN A BUNCH OF DEPOSITIONS TAKEN IN THE CASE
17 THAT RELATE TO DAMAGES ISSUE SINCE THE ORIGINAL ORACLE EXPERT
18 REPORT WAS SERVED.

19 AND SO I SUSPECT THEIR EXPERT IS REVIEWING THOSE, AS
20 OURS ARE.

21 **THE COURT:** YES, SIR.

22 **MR. KEARL:** I WOULD PUT THE QUESTION, I THINK, IN A
23 SLIGHTLY DIFFERENT WAY. BUT I THINK IT'S THE SAME QUESTION. I
24 THINK THIS IS DOABLE FOR ME AND FOR ANY EXPERT. AND A CRITIQUE
25 OF ACTUAL EXPERT REPORTS WHERE YOU ARE CRITIQUING THE SET OF

1 ASSUMPTIONS AND YOU HAVE THE REPORT BEFORE YOU AND YOU HAVE THE
2 MATERIALS RELIED ON BY THE EXPERTS. TO PUT FORTH AN INDEPENDENT
3 OPINION IS A CHALLENGE. AND I DON'T THINK, ONE, THE TIME
4 SCHEDULE; AND, TWO, I DON'T KNOW WHETHER MR. COOPER KNOWS THE
5 RECORD, BECAUSE TYPICALLY IN THESE KINDS OF CASES AN EXPERT HAS
6 ACCESS TO THE ENTIRE RECORDS, BUT SAYS TO THE ATTORNEYS: "HERE
7 ARE THE ISSUES I'M INTERESTED IN. TELL ME WHAT THE RELEVANT
8 DEPOSITIONS AND EVIDENCE IS."

9 AND I'M ASSUMING I CAN'T TURN TO THESE TWO GROUPS OF
10 ATTORNEYS FOR THAT. AND THERE'S JUST SIMPLY NO WAY THAT I THINK
11 IN A MONTH ONE COULD LOOK AT THIS RECORD AND DECIDE WHAT WAS
12 RELEVANT TO AN INDEPENDENT OPINION ABOUT THIS MATTER.

13 SO, IF MR. COOPER KNOWS THE RECORD WELL, THEN, COULD
14 I TURN TO HIM IN THE SAME WAY I WOULD TURN TO ANY OTHER ATTORNEY
15 ON THE SIDE, AND THAT WOULD WORK. BUT OTHER SHORT OF THAT I
16 THINK, FRANKLY, THAT WHAT YOU COULD GET FROM ME -- AND I SUPPOSE
17 FROM MR. DEGEN, AND I THINK I SHOULDN'T SPEAK FOR HIM -- IS A
18 GOOD CRITIQUE OF THE EXPERTS, BUT NOT AN INDEPENDENT JUDGMENT OF
19 THE APPROPRIATE DAMAGES.

20 **THE COURT:** YES, SIR.

21 **MR. DEGEN:** I WOULD JUST ADD TO THAT I THINK WE CAN
22 GO A LITTLE BEYOND A CRITIQUE OF THE TWO SIDES, BUT OUR UNIVERSE
23 OF -- FOR FORMING OUR INDEPENDENT OPINIONS, OUR UNIVERSE WOULD
24 BE SOMEWHAT FILTERED BY THE DOCUMENTS AND THE DEPOSITION
25 TESTIMONY THAT THE TWO EXISTING EXPERTS --

1 **THE COURT:** FAIR ENOUGH. YOU COULD TURN TO WHAT WAS
2 IN THOSE TWO EXPERT REPORTS AND SAY "WHAT WAS -- IF I WERE TO DO
3 THIS, USING THAT INFORMATION, HOW WOULD I INDEPENDENTLY MAKE A
4 JUDGMENT ABOUT THIS?"

5 THAT YOU COULD DO. BUT EXPERTS SCREEN DATA IN
6 DIFFERENT WAYS AND INFORMATION DIFFERENT WAYS. AND SO --

7 **MR. COOPER:** YOUR HONOR, MAY I MAKE AN OBSERVATION?

8 **THE COURT:** OF COURSE.

9 **MR. COOPER:** I DO NOT KNOW THE RECORD, AND SO I HAVE
10 JUST GOTTEN INTO THIS RECENTLY. BUT WOULD IT BE POSSIBLE FOR
11 THE PARTIES OR THE COURT TO FOCUS THE ISSUES ON WHICH THE
12 EXPERTS WOULD BE ASKED TO OPINE, AND THEN TO THE EXTENT
13 POSSIBLE ASK THE PARTIES WHAT FACTS COULD BE STIPULATED TO?

14 IF THEY COULD -- IT STRIKES ME THAT THERE ARE
15 PROBABLY A CERTAIN NUMBER OF FACTS HERE THAT I'VE HEARD IN
16 COMMON FROM BOTH OF THE STATEMENTS THAT COULD BE STIPULATED TO.
17 AND THEN, WE COULD FOCUS THE OPINIONS THAT THESE EXPERTS WOULD
18 OFFER THAT MAY MAKE THIS A LITTLE MORE MANAGEABLE THAN JUST
19 START WITH EVERYTHING.

20 **THE COURT:** WELL, I DON'T KNOW THE ANSWER TO THAT.

21 LET ME ASK THE LAWYERS THAT QUESTION.

22 **MR. VAN NEST:** YOUR HONOR, I'M NOT -- I THINK BOTH
23 GENTLEMEN HAVE MADE REASONABLE POINTS. I'M NOT TERRIBLY TROUBLED
24 BY LIMITING THEIR REVIEW PRIMARILY TO WHAT'S IN THE EXPERT
25 REPORTS WITH THE CAVEAT THAT IF THEY LOOK AT THE REPORTS AND

1 THERE'S SOME CRITICAL HOLE, THEY CERTAINLY COULD ASK MR. COOPER:
2 "IS THIS INFORMATION AVAILABLE?" AND HE CAN ASK US.

3 I MEAN, I DON'T THINK --

4 **THE COURT:** WHEN YOU SAY "IN THE REPORT," YOU MEAN
5 THE MATERIAL THAT -- EVERYTHING THAT THE EXPERT REVIEWED OR DO
6 YOU MEAN LITERALLY WHAT'S WRITTEN INTO THE 25-PAGE REPORT?

7 **MR. VAN NEST:** WELL, BOTH, REALLY. I MEAN, THE EXPERT
8 REPORTS WILL HAVE LONG LISTS OF WHAT WAS REVIEWED. BUT,
9 OBVIOUSLY, IN READING THE REPORT ONE CAN FIGURE OUT, AND
10 PARTICULARLY THESE TWO GENTLEMEN WILL FIGURE OUT WHAT ARE THE
11 IMPORTANT ITEMS?

12 WHAT ARE THE CRITICAL FACTS? WHAT WERE THE OTHER
13 LICENSES? WHAT WERE THE COURSE OF NEGOTIATIONS? WHAT WAS OUT
14 THERE?

15 I MEAN, I THINK THAT WILL BE APPARENT. I'M NOT
16 TROUBLED BY ACKNOWLEDGING THAT THEIR PRIMARY SOURCE OF
17 INFORMATION SHOULD BE THE UNDERLYING MATERIALS THAT THE EXPERTS,
18 BOTH, RELIED ON, BECAUSE IF SOMETHING IS NOT DEEMED SIGNIFICANT
19 ENOUGH FOR EITHER THE PLAINTIFF'S EXPERT OR THE DEFENSE EXPERT
20 TO LOOK AT AND REFERENCE, IT'S LIKELY, I THINK, GIVEN THE
21 CALIBER OF PEOPLE WE'RE DEALING WITH HERE THAT IT'S NOT GOING TO
22 BE THAT SIGNIFICANT.

23 IF THERE IS SOMETHING SIGNIFICANT THAT NEITHER OF OUR
24 INDEPENDENT ECONOMISTS THOUGHT WAS IMPORTANT, THEY COULD
25 CERTAINLY ASK MR. COOPER: "WOULD YOU PLEASE INQUIRE? IS THIS

1 AVAILABLE? IS THIS INFORMATION AVAILABLE OR NOT?"

2 AND IF IT IS WE WILL MAKE IT AVAILABLE, AND IF IT
3 ISN'T, THEN IT ISN'T. BUT I'M NOT TERRIBLY TROUBLED BY THE
4 LIMITATION THEY ARE SEEKING.

5 **MR. JACOBS:** WE HAD EXACTLY THE SAME THOUGHT, YOUR
6 HONOR, THAT THE TWO REPORTS WILL DEFINE A BODY OF RELEVANT
7 INFORMATION. IT'S NOT MERELY REFERENCED, IT'S RELIED ON. SO
8 IT'S A LITTLE NARROWER SCOPE THAN YOU MAY BE USED TO FROM THE
9 PAST.

10 AND WE COULD RAPIDLY RESPOND TO QUERIES FOR WHETHER
11 THERE'S ADDITIONAL INFORMATION.

12 IT OCCURS TO US FURTHER THAT THERE'S A CONSIDERABLE
13 BODY OF MATERIAL THAT HAS ALREADY BEEN RELIED ON IN -- I THINK
14 THE COURT WILL WANT TO MAKE KIND OF YOUR OWN DECISION ABOUT
15 WHETHER THEY SHOULD SEE THE REPORT THAT YOUR DAUBERT MOTION
16 ADDRESSED. BUT SETTING THAT ASIDE, THERE'S A BODY OF MATERIAL
17 REFERENCED THERE AND A BODY OF MATERIAL REFERENCED IN THE
18 DAUBERT BRIEFING THAT I THINK IS RELATIVELY BALANCED, BECAUSE IT
19 WAS THAT MATERIAL THAT GOOGLE WAS RELYING ON TO TAKE A RUN AT
20 THAT REPORT. THAT MATERIAL COULD BE GATHERED UP. THE SELECTED
21 EXPERT COULD START LOOKING AT THAT SOONER RATHER THAN WAIT FOR
22 BOTH REPORTS TO COME IN.

23 **THE COURT:** WELL, IF I DID THAT I WOULD HAVE TO SHOW
24 THE ORIGINAL REPORT AND ALL THAT WAS RESPONSIVE TO, WHICH WAS
25 THEN STRICKEN IN THE SENSE THAT I SAID: "GO BACK AND START OVER

1 AGAIN."

2 BUT I DIDN'T SAY EVERYTHING IN IT WAS WRONG. I SAID
3 CERTAIN THINGS IN THERE WERE WRONG.

4 BUT MR. COOPER ASKED ABOUT STIPULATIONS, AND NOBODY
5 SAID YOU WOULD STIPULATE TO ANYTHING.

6 I DON'T THINK YOU ARE GOING TO GET ANY STIPULATIONS
7 OUT OF THEM IN TERMS OF FACTS. IS THAT WHAT YOU MEANT?

8 **MR. COOPER:** YES, THAT THERE ARE -- FROM LISTENING TO
9 COUNSELS IT APPEARED TO ME THAT THERE MIGHT BE SOME COMMON SETS
10 OF FACTS THAT THEY COULD AGREE TO AND COULD FOCUS WHAT IS RELIED
11 UPON, AND THEN MAYBE WE COULD FOCUS ON WHAT THE ACTUAL -- WHAT
12 THE MOST CRITICAL ISSUES ARE; WHAT THE MOST CRITICAL QUESTIONS
13 ARE AS OPPOSED TO SAYING "LET'S DO A" --

14 **THE COURT:** NO, JUST HEARING THAT LAST PART I CAN
15 TELL YOU THE ANSWER.

16 **MR. COOPER:** NO?

17 **THE COURT:** NO.

18 **MR. COOPER:** OKAY.

19 **THE COURT:** THEY WILL NOT EVEN AGREE ON WHAT THE MOST
20 CRITICAL ISSUES ARE, I DON'T THINK. I THINK THEY WOULD LIKELY
21 AGREE ON A VERY GENERAL TIME FRAME AND CHRONOLOGY. BUT OBVIOUSLY
22 THEY CAN'T DENY THAT THERE WERE CERTAIN E-MAILS AND CERTAIN
23 COMMUNICATIONS BACK AND FORTH.

24 BUT THEY -- I DON'T THINK THEY ARE GOING -- THEY ARE
25 NOT GOING TO SAY "THIS IS THE HEART OF THE CASE."

1 YOU'LL NEVER GET THEM TO PIN THEMSELVES DOWN LIKE
2 THAT. I'VE JUST SEEN TOO MUCH OF THIS CASE ALREADY. I TELL YOU
3 THEY ARE FIGHTING OVER MANY ITEMS.

4 SO OKAY. SO LET ME COME BACK TO THIS.

5 SO LET'S SAY INSTEAD OF DOING AN INDEPENDENT, YOU
6 WOULD DO A CRITIQUE OF EACH SIDE. NOW, A CRITIQUE? MAYBE A
7 CRITIQUE PLUS.

8 FOR EXAMPLE, LET'S SAY YOU LOOKED AT ONE REPORT, AND
9 IT HAD TEN POINTS. AND YOU THOUGHT THREE OF THE POINTS WERE
10 VERY WELL SUPPORTED, FIT IN WITH YOUR VIEW OF ECONOMICS, SEEMED
11 SOLID. THREE OF THEM SEEMED COMPLETELY FLAKEY AND
12 ARGUMENTATIVE. AND THE OTHERS WERE IN-BETWEEN. I MEAN, SOME
13 SORT OF ANALYSIS OF -- AND ALSO A SENSITIVITY ANALYSIS IN THE
14 SENSE OF: IF THIS ASSUMPTION GOES, THEN THE ENTIRE REPORT GOES
15 FROM X DOLLARS TO 1 PERCENT OF X DOLLARS.

16 AND SO THAT ASSUMPTION IS A BIG TICKET ITEM.

17 AND YOUR ANALYSIS OF THAT FOR THE JURY, AND THAT KIND
18 OF -- I'D CALL SENSITIVITY ANALYSIS -- WOULD BE USEFUL. AND THAT
19 WOULD BE WITHOUT YOU YOURSELF COMING TO YOUR OWN CONCLUSION.

20 IN OTHER WORDS, YOU DON'T HAVE TO NECESSARILY COME UP
21 WITH YOUR OWN NUMBER, THOUGH THAT'S WHAT I STARTED OUT THINKING
22 WOULD BE GOOD. BUT A CRITIQUE OF THE -- A PROFESSIONAL
23 CRITIQUE.

24 DOES THAT SOUND LIKE IT'S A DOABLE PROJECT?

25 YES, SIR.

1 **MR. DEGEN:** WOULD IT BE A PROFESSIONAL CRITIQUE WITH
2 INDEPENDENT OPINIONS BASED ON THE FACTS?

3 **THE COURT:** WELL, NO. THE CLOSER YOU COULD GET TO AN
4 INDEPENDENT OPINION OF WHAT YOU THOUGHT WOULD BE THE RIGHT
5 NUMBER OR RANGE, THAT WOULD BE BETTER. BUT EVEN IF THAT COULD
6 NOT BE DONE, THE LAST STEP COULD NOT BE DONE, I AM POSITIVE THE
7 JURY WOULD BENEFIT FROM A GOOD INDEPENDENT PROFESSIONAL CRITIQUE
8 OF THE TWO COMPETING SIDES.

9 ALL RIGHT. WELL, THINK ABOUT THAT, THAT NOTION.

10 DO EITHER OF YOU KNOW THE EXPERTS THAT HAVE BEEN --
11 LET'S MAKE -- BECAUSE IF ONE OF THEM TURNED OUT TO BE YOUR GOOD
12 FRIEND, YOU MIGHT BE -- ONE SIDE OR THE OTHER MIGHT WONDER
13 WHETHER YOU WOULD BE ABLE TO BE CRITICAL OF THAT PERSON.

14 SO WHO ARE THE EXPERTS WE WILL BE CRITIQUING HERE?

15 **MR. HOLTZMAN:** OUR ORIGINAL EXPERT WAS PROFESSOR IAIN
16 COCKBURN, BOSTON UNIVERSITY. WE MAY OR MAY NOT ADD A SECOND
17 EXPERT, WHO WOULD MOST LIKELY BE KEN SERWIN.

18 **THE COURT:** KEN WHO?

19 **MR. HOLTZMAN:** SERWIN, S-E-R-W-I-N. THOSE WOULD BE
20 THE PRIMARY DAMAGE-RELATED EXPERTS.

21 THERE, OF COURSE, ARE TECHNICAL EXPERTS IN THE CASE,
22 TOO. AND TO THE EXTENT THAT ONE OF THE THINGS WE WILL BE
23 DEBATING WITH THE OTHER SIDE IS THE IMPORTANCE OF THE PATENTS
24 AND THE COPYRIGHTS, THE TECHNICAL ASPECTS OF THE PATENTS AND
25 COPYRIGHTS WILL VERY MUCH COME INTO THE ISSUE OF DAMAGES.

1 **THE COURT:** I WANT TO COME TO THAT POINT IN A SECOND.
2 BUT LET ME JUST PAUSE HERE.

3 DID EITHER OF YOU KNOW THE TWO INDIVIDUALS THAT WERE
4 JUST NAMED?

5 **MR. KEARL:** NO, I DON'T.

6 **THE COURT:** NO.

7 **MR. DEGEN:** THE NAME "SERWIN" IS FAMILIAR. I MAY
8 HAVE OPPOSED HIM AT SOME POINT, BUT I DON'T KNOW HIM PERSONALLY.

9 **THE COURT:** BUT YOU CERTAINLY DON'T HAVE ANY
10 PROFESSIONAL, CLOSE PROFESSIONAL RELATIONSHIP OR FRIENDSHIP THAT
11 WOULD GET IN THE WAY OF YOU BEING AN INDEPENDENT EXPERT.

12 **MR. DEGEN:** THAT'S CORRECT, YOUR HONOR.

13 **THE COURT:** OKAY. THEN, ON YOUR SIDE.

14 **MR. PURCELL:** OUR DAMAGES EXPERT IS GREGORY LEONARD
15 WHO IS LOCAL HERE IN SAN FRANCISCO WITH NERA CONSULTING FIRM.

16 **THE COURT:** HOW ABOUT THAT NAME?

17 **MR. KEARL:** GREG LEONARD IS A NAME I KNOW. I'VE BEEN
18 OPPOSED TO HIM ON A COUPLE OF CASES. HE MAY HAVE BEEN ON THE
19 SAME SIDE IN ONE CASE. I WOULD HAVE TO GO CHECK. BUT I DON'T
20 KNOW HIM PERSONALLY. I WOULDN'T RECOGNIZE HIM IF HE WALKED IN
21 THE ROOM.

22 **THE COURT:** ALL RIGHT. SO YOU WOULD NOT BE
23 IMPEACHABLE ON THE GROUND THAT -- I MEAN, IT'S OKAY THAT YOU
24 KNOW SOMEBODY BY REPUTATION.

25 **MR. KEARL:** I KNOW HIM BY REPUTATION. THAT'S IT.

1 THAT'S IT.

2 **THE COURT:** OKAY. AND?

3 **MR. DEGEN:** I DON'T KNOW HIM, YOUR HONOR.

4 **THE COURT:** OKAY. GOOD. ALL RIGHT. SO NOW LET'S TURN
5 TO A DIFFERENT ISSUE THAT -- ARE YOU STILL GOING TO BE MAKING
6 THE ARGUMENT THAT'S BASED ON THE ENTIRE MARKET VALUE RULE.

7 **MR. HOLTZMAN:** NO, YOUR HONOR. WE DON'T VIEW THIS
8 AS AN ISSUE OF THE ENTIRE MARKET VALUE RULE. WE VIEW THIS AS
9 ONE WAY OR ANOTHER A QUESTION OF APPORTIONMENT: WHAT IS THE
10 PROPER APPORTIONMENT OF VALUE OF PATENTS? AND THE STANDARD, AS
11 YOU KNOW, IS A LITTLE DIFFERENT ON COPYRIGHTS, BUT FUNDAMENTALLY
12 IT'S THE SAME IDEA.

13 SO IT'S SOMEWHERE BETWEEN ZERO AND A HUNDRED PERCENT.
14 BUT EITHER WAY IT'S AN APPORTIONMENT VALUE.

15 **THE COURT:** WELL, I HAVE TOLD YOU YOU HAVE TO
16 APPORTION.

17 **MR. HOLTZMAN:** THAT'S WHAT I'M SAYING, YOUR HONOR.

18 **THE COURT:** ALL RIGHT. SO -- BUT YOU SAID SOMETHING
19 EARLIER ABOUT IT BEING PART OF THE DAMAGES, THIS OTHER EXPERT
20 BEING PART OF THE DAMAGES. WHAT DID YOU MEAN BY THAT?

21 **MR. HOLTZMAN:** WHAT I MEANT, YOUR HONOR, IS AS WE
22 LOOK -- WHETHER YOU LOOK AT THE VALUE OF THE PATENTS AND THE
23 COPYRIGHTS IN THE CONTEXT OF THE WHOLE PORTFOLIO, WE TALKED
24 EARLIER ABOUT THE ACTUAL NEGOTIATIONS BETWEEN THE PARTIES, THAT
25 CONCERN PATENTS AND COPYRIGHTS, A LARGER GROUP OF THEM THAN JUST

1 THESE SEVEN PATENTS AND THE COPYRIGHTS AND THE 37 API'S THAT
2 WE'RE TALKING ABOUT HERE.

3 SO PART OF THE APPORTIONMENT ISSUE IS HOW MUCH OF THE
4 PORTFOLIO IS PROPERLY ACCOUNTED FOR BY THESE SEVEN PATENTS AND
5 COPYRIGHTS? AND IN PART THAT GOES TO AS A TECHNICAL MATTER HOW
6 IMPORTANT THEY ARE, AND THE FUNCTIONING VIRTUAL MACHINES. HOW
7 IMPORTANT ARE THEY TO DEVELOPERS IN HAVING THAT COMPATIBILITY
8 AND OPERABILITY COMPARED TO WHAT ELSE MAY BE IN THE PORTFOLIO.

9 SIMILARLY, HOW IMPORTANT ARE THEY TO THE FUNCTIONING
10 OF ANDROID, ANDROID BEING A COMMERCIALLY VIABLE PRODUCT AS
11 MR. JACOBS SAID BEFORE. SO THERE ARE TECHNICAL ISSUES ON BOTH
12 SIDES OF THAT. THE RELEVANCE OF THOSE ISSUES WILL I CAN SEE BE
13 DISPUTED, BUT THEY ARE BOTH OF A TECHNICAL NATURE.

14 **THE COURT:** I SEE. ALL RIGHT. IF YOU WANT TO I'LL
15 GIVE YOU EQUAL TIME IF YOU WANT TO RESPOND TO THAT IN ANY WAY.

16 **MR. VAN NEST:** I DON'T THINK WE NEED TO, YOUR HONOR.

17 **MR. DEGEN:** YOUR HONOR?

18 **THE COURT:** YES, SIR.

19 **MR. DEGEN:** WOULD WE HAVE ACCESS TO BOTH SIDES'
20 TECHNICAL EXPERTS? AND I ASK THAT BECAUSE IN MY EXPERIENCE
21 DEFINING WHERE THE METES AND BOUNDS OF THE PATENTS OR THE
22 COPYRIGHTED MATERIAL ARE IS IMPORTANT IN PLACING VALUE.

23 **THE COURT:** WELL, THE ANSWER TO THIS IS, I THINK,
24 YES. IF THAT'S WHAT YOU WANT TO DO YOUR JOB, I WOULD -- YOU
25 WOULD ASK THESE LAWYERS OR THROUGH MR. COOPER ASK THOSE LAWYERS

1 TO HAVE ACCESS TO THE TECHNICAL PEOPLE TO DO YOUR JOB.

2 **MR. DEGEN:** THANK YOU, YOUR HONOR.

3 **THE COURT:** IF THAT'S WHAT YOU FELT YOU NEEDED TO DO
4 YOUR JOB.

5 DO EITHER OF YOU KNOW ANY OF THE LAWYERS HERE OR THE
6 LAWS FIRMS INVOLVED? YOU MIGHT KNOW THEM, BUT I MEAN DO YOU
7 HAVE ANY CLOSE PROFESSIONAL OR PERSONAL RELATIONSHIPS WITH
8 EITHER OF THE LAW FIRMS? DO YOU KNOW WHO THE LAW FIRMS ARE?

9 **MR. KEARL:** YES.

10 **THE COURT:** OR THE INDIVIDUAL LAWYERS, OR FOR THAT
11 MATTER, GOOGLE OR ORACLE?

12 **MR. KEARL:** FOR ME, NO.

13 **MR. DEGEN:** I'VE NEVER WORKED WITH ANY OF THEM. I
14 DON'T KNOW ANY OF THEM. I'VE NOT WORKED WITH ORACLE OR GOOGLE.

15 **THE COURT:** OKAY. PERFECT.

16 NOW, I WANT TO GO BACK TO PAYMENT FOR A MINUTE. THE
17 RULE SPECIFICALLY SAYS THAT THE PARTIES CAN BE REQUIRED TO PAY
18 YOUR CHARGES IN SOME MANNER, WHICH I ALLOCATED. BUT AT THE END
19 OF THE DAY THE COURT CAN'T PAY YOU. IT'S THE PARTIES THAT PAY
20 YOU. SO YOU WOULD HAVE TO RELY UPON THE FULL FAITH AND CREDIT OF
21 THESE TWO BIG COMPANIES.

22 IN THIS CASE THAT'S PROBABLY NOT A PROBLEM. BUT IN
23 SOME CASES IT WOULD BE A PROBLEM. BUT I JUST -- YOU NEED TO
24 UNDERSTAND THAT THE COURT CANNOT WRITE YOU A CHECK. THE COURT
25 CAN ONLY ORDER THEM TO WRITE THE CHECK.

1 **MR. KEARL:** THAT'S GOOD ENOUGH.

2 **THE COURT:** OKAY.

3 **MR. DEGEN:** SAME HERE.

4 **THE COURT:** ALL RIGHT. THEN, BEFORE IT BECAME
5 OFFICIAL WE WOULD HAVE TO GIVE YOU LIKE AN ASSIGNMENT, A WRITTEN
6 ASSIGNMENT. AND YOU WOULD HAVE TO READ IT AND MAKE SURE IT'S
7 OKAY WITH YOU. AND THEN, YOU WOULD UNDERTAKE TO DO IT. AND
8 AGAIN, THIS IS A -- YOU WOULD BE DOING THIS UNDER OATH.

9 IT WOULD BE YOUR BEST PROFESSIONAL JUDGMENT. AND YOU
10 WOULD SAY THAT TO THE JURY. AND THAT'S WHAT WE WANT. I DON'T
11 CARE WHERE YOU COME OUT ON IT.

12 WHAT IS IMPORTANT IS TO ASSIST THE JURY THROUGH AN
13 INDEPENDENT, PROFESSIONAL, UNDER OATH TESTIMONY FROM SOMEBODY
14 WITH YOUR QUALIFICATIONS.

15 AND, BY THE WAY, BOTH SIDES BELIEVE THAT YOU ARE
16 THOROUGHLY -- BOTH OF YOU ARE THOROUGHLY QUALIFIED TO DO THIS,
17 SO THERE'S NOT ANY ISSUE THERE.

18 SO THAT'S WHAT IT COMES DOWN TO.

19 YES, SIR.

20 **MR. DEGEN:** DOES THAT MEAN WE WON'T BE FACING DAUBERT
21 MOTIONS IN THIS CASE?

22 **THE COURT:** PROBABLY. PROBABLY THAT'S WHAT IT MEANS,
23 BUT I CAN'T RULE ANYTHING OUT. I CAN ONLY SAY I THINK THAT WOULD
24 BE UNLIKELY.

25 **MR. KEARL:** A VIGOROUS CROSS.

1 **THE COURT:** SO THE WAY I WANT TO LEAVE THIS IS THAT I
2 WANT TO GIVE YOU THE CHANCE TO DO A COUPLE OF THINGS; FOR YOU TO
3 GO BACK AND THINK ABOUT WHAT HAPPENED HERE TODAY. I WANT TO ALSO
4 GIVE YOU A CHANCE TO ASK ANY MORE QUESTIONS BEFORE WE BREAK UP.
5 AND I DON'T WANT TO PUT YOU ON THE SPOT RIGHT NOW.

6 THEN, I'D LIKE FOR YOU TO WRITE ME A LETTER. AND
7 THEN, I PROBABLY WILL WIND UP SHARING IT WITH THE ATTORNEYS,
8 BUT -- SO BE MINDFUL OF THAT.

9 BUT FOR THE TIME BEING IT WOULD JUST BE A LETTER TO
10 ME, AND IT WOULD COVER THE TIMETABLE ISSUES, THE STAFFING
11 ISSUES, WHAT YOU WOULD CHARGE US TO DO THIS, AND ANYTHING ELSE
12 THAT'S COME UP HERE TODAY, ANY CONFLICTS THAT YOU MAY THINK OF
13 AFTER YOU ARE ON THE WAY BACK HOME.

14 AND THEN, I WILL PICK THE ONE OF YOU THAT OVERALL
15 FITS INTO THE SCHEDULE AND THE ASSIGNMENT IN THE BEST WAY I CAN.
16 WITHOUT ANY DOUBT, YOU BOTH ARE SUPERBLY QUALIFIED. SO THAT'S
17 NOT AN ISSUE HERE.

18 BUT DO YOU HAVE QUESTIONS THAT I CAN HELP YOU WITH?

19 YES, SIR.

20 **MR. DEGEN:** WHEN YOU SAY WHAT WE WILL CHARGE YOU, ARE
21 YOU LOOKING FOR MORE THAN A FEE SCHEDULE? ARE YOU LOOKING FOR A
22 BUDGET ESTIMATE?

23 **THE COURT:** WELL, BOTH WOULD BE USEFUL. AN HOURLY
24 RATE WOULD BE GOOD, YOU KNOW, WHAT YOU WOULD SEE AS THE POSSIBLE
25 BUDGET. BUT I WOULDN'T HOLD YOU TO AN EXACT NUMBER.

1 BUT IF ONE OF YOU CAME IN AND SAID "I THINK I'D NEED
2 X HOURS," AND THE OTHER CAME IN AND SAID "I NEED 3X HOURS," I
3 MIGHT GO WITH X HOURS BECAUSE I DO BELIEVE IN KEEPING COSTS
4 DOWN.

5 ON THE OTHER HAND, IF ONE OF YOU SAID "MY" -- THAT
6 YOUR RATE WAS \$5 AN HOUR MORE THAN THE OTHER WOULD BE, THAT
7 WOULD BE A SMALL FACTOR. BUT IF IT WAS \$50 AN HOUR MORE THAT
8 WOULD START TO MATTER.

9 SO THE HOURLY RATE AND WHAT YOU WOULD ESTIMATE AS A
10 PROBABLY BUDGET WOULD BE GOOD. YOU KNOW, I'VE GOT TO BE A
11 LITTLE FAIR TO YOU BECAUSE YOU DON'T KNOW ENOUGH ABOUT THE CASE
12 TO GIVE ME A FINAL BUDGET. THAT WOULD BE -- BUT MAYBE YOU COULD
13 GIVE ME A BALLPARK IDEA WHAT YOU THINK WOULD BE INVOLVED.

14 **MR. DEGEN:** WELL, I THINK IT'S MAINLY AN ISSUE HERE
15 BECAUSE IF YOU STAY ON SCHEDULE, THIS IS PRETTY MUCH GOING TO
16 FILL THE TIME BETWEEN NOW AND THEN. I MEAN, IT'S BASICALLY A
17 FULL-TIME JOB. IF THE SCHEDULE SLIDES THREE OR FOUR MONTHS THE
18 AMOUNT OF WORK COULD EASILY DOUBLE, AND I'M SAYING THAT BECAUSE
19 ON THE CURRENT SCHEDULE --

20 **THE COURT:** WELL, THEN, YOU COULD PUT IT BOTH WAYS.

21 **MR. DEGEN:** OKAY.

22 **THE COURT:** I THINK THOSE ARE BOTH VERY VALID
23 CONSIDERATIONS.

24 YES, SIR.

25 **MR. DEGEN:** YOU KNOW, I WOULD DO THE BEST JOB I COULD

1 FOR AN OCTOBER FILING OR AN OCTOBER TRIAL, BUT IN TRUTH I DON'T
2 THINK IT'S PROBABLY ENOUGH.

3 **THE COURT:** RIGHT. AND YOU NEED IN YOUR LETTER TO
4 REMIND ME OF THOSE TWO, THE DATES YOU ARE UNAVAILABLE IN
5 NOVEMBER, BECAUSE THIS IS AN OCTOBER 31 TRIAL DATE. SO THAT
6 REALLY IS A NOVEMBER -- YOU KNOW, WOULD CONSUME ALL OF NOVEMBER,
7 BASICALLY.

8 YES, SIR.

9 **MR. KEARL:** TWO OR THREE QUESTIONS? WHEN IS THE
10 DEPOSITION ON THE DEFENDANT'S REPORT?

11 **THE COURT:** SAY THAT AGAIN.

12 **MR. KEARL:** TO THE REPORT IS DUE OCTOBER 4TH. WHEN
13 IS DEPOSITION SCHEDULED?

14 **THE COURT:** THAT'S A GOOD POINT. YOU MIGHT WANT TO
15 ATTEND THOSE DEPOSITIONS.

16 **MR. KEARL:** WELL, IF THE TRIAL BEGINS THE 31ST AND WE
17 DON'T KNOW WHAT SORT OF -- HOW THEY ARE TIED DOWN IN THE
18 DEPOSITION UNTIL SOMETIME BETWEEN THE 4TH AND THE 31ST, WE'RE
19 REALLY CLOSE. I MEAN --

20 **THE COURT:** RIGHT. THAT'S A GOOD POINT. I DON'T
21 KNOW. HAVE YOU ALL GOTTEN THAT FAR YET?

22 **MR. VAN NEST:** NO, YOUR HONOR.

23 **MR. PURCELL:** WE HAVEN'T, YOUR HONOR. WE WOULD TRY
24 TO MAKE DR. LEONARD AVAILABLE AS QUICKLY AS WE COULD AFTER THE
25 4TH. I CERTAINLY UNDERSTAND THE SCHEDULE.

1 WE WILL TRY TO WORK WITH --

2 **THE COURT:** WHEN IS YOURS DUE?

3 **MR. HOLTZMAN:** SEPTEMBER 12.

4 **THE COURT:** SO THE WAY IT WORKS I THINK THEY HAVE A
5 TWO-WEEK PERIOD WITHIN WHICH -- I THINK IF IT COMES OUT ON THE
6 12TH, MY GUESS IS WITHIN A WEEK THEY ARE GOING TO DEPOSE -- THE
7 OTHER SIDE WOULD DEPOSE HIM, RIGHT?

8 **MR. PURCELL:** CORRECT.

9 **THE COURT:** AND THEN, THEIR EXPERT WOULD THEN BE
10 THERE TO LISTEN TO THAT TESTIMONY. AND YOU'D PROBABLY WANT TO
11 BE THERE. YOU COULD BE THERE, ANYWAY, OR READ IT LATER. BUT IT
12 COULD BE YOUR CHOICE, I THINK. I WOULD BE ALL IN FAVOR OF YOU
13 ATTENDING THE DEPOSITION.

14 **MR. KEARL:** A COUPLE OF THINGS. WELL, TWO OR THREE
15 THINGS ON THAT. YOU OBVIOUSLY WILL NOT AND SHOULDN'T SCHEDULE
16 THIS AROUND THE PEOPLE YOU'RE GOING TO PULL IN ON THIS. BUT IF
17 THIS -- IF THIS DEPOSITION IS, LET'S SAY, ON THE 11TH OR 15TH OF
18 OCTOBER, I THINK IT'S ALMOST IMPOSSIBLE TO EXPECT A WRITTEN
19 REPORT FROM ME IN TIME FOR A DEPOSITION BEFORE -- BY BOTH SIDES
20 BEFORE A 31ST TRIAL DATE. I DON'T SEE HOW THAT WORKS.

21 **THE COURT:** I SEE THE PROBLEM.

22 **MR. DEGEN:** AND I AGREE COMPLETELY. I DON'T THINK
23 THE SCHEDULE IS WORKABLE.

24 **MR. KEARL:** IN FAIRNESS, WE CAN SKETCH OUT A REPORT,
25 BUT I CAN'T WRITE A REPORT UNTIL I SEE A DEPOSITION AND I

1 COMPLETE A REPORT ON THAT. SO IF YOU WANT TO START THIS A MONTH
2 LATER I THINK THIS IS A MORE DOABLE PROJECT THAN THE PROJECT AS
3 SCHEDULED. BUT THAT IS A DIFFERENT ISSUE.

4 SECOND, DO YOU EXPECT THAT THE EXPERT WILL BE -- THAT
5 WE WILL BE AT TRIAL OR ONLY AT TRIAL FOR THE TESTIMONY OF THE
6 DAMAGE EXPERTS?

7 **THE COURT:** WELL, I DON'T THINK YOU WOULD NEED TO BE
8 THERE FOR THE WHOLE TRIAL.

9 **MR. KEARL:** OKAY.

10 **THE COURT:** YOU WOULD MOST LIKELY BE THERE FOR THE
11 EXPERT. AND ONE ISSUE I'VE NOT YET RAISED WITH THE LAWYERS IS
12 THE IDEA OF BACK-TO-BACK EXPERTS. AND THEN, YOU WOULD FOLLOW
13 THE TWO EXPERTS. IN OTHER WORDS, THAT THE JURY CAN UNDERSTAND
14 THE -- WELL, THERE'S SEVERAL THINGS. ONE IS BIFURCATING DAMAGES
15 TO BEGIN WITH, BECAUSE IF THE JURY WERE TO FIND AGAINST THE
16 PLAINTIFF WE WOULDN'T EVEN HAVE TO WORRY ABOUT DAMAGES AND
17 EVERYONE COULD GO HOME, WHICH I'M GIVING SERIOUS THOUGHT TO.

18 AND THE PLAINTIFFS ALWAYS HATE THAT, BUT THAT'S THEIR
19 PROBLEM. I HAVE A VERY MASSIVE CALENDAR TO RUN. SO
20 THAT'S -- BUT REGARDLESS OF HOW THAT COMES OUT HAVING ONE, TWO,
21 THREE, YOU BEING THE THIRD, OR ONE OF YOU BEING THE THIRD, IS
22 ONE WAY TO GO THAT -- AND YOU WOULD DEFINITELY WANT TO BE THERE
23 FOR THE OTHER EXPERTS.

24 I DON'T KNOW HOW WE WILL SEQUENCE THE EXPERTS YET,
25 BUT YOU SHOULD BE THERE WHEN THEY TESTIFY. BUT NOT FOR THE REST

1 OF THE TRIAL. THAT WOULD BE AN UNNECESSARY EXPENSE AND
2 UNNECESSARY.

3 **MR. KEARL:** TWO OTHER THINGS. IN SORT OF THE SPIRIT
4 OF FULL DISCLOSURE, ONE: I CAN MEET THE SCHEDULE. I DO TEACH AT
5 BRIGHAM YOUNG UNIVERSITY. AND I CAN ARRANGE FOR SOME MISSES,
6 BUT I WOULD NEED TO KNOW -- I NEED SOME LEADS ON WHEN I WOULD
7 HAVE TO BE HERE.

8 **THE COURT:** OF COURSE.

9 **MR. KEARL:** I CAN'T STRAND 500 STUDENTS AT THE LAST
10 MINUTE.

11 **THE COURT:** VERY REASONABLE REQUEST. I WOULD MAKE
12 THE LAWYERS GIVE YOU THAT KIND OF NOTICE.

13 **MR. KEARL:** ALL OF THE WORK THAT I DO IS MY OWN WORK.
14 THAT IS, I WRITE THE FINAL REPORT, BUT IT IS ALWAYS
15 COLLABORATIVE WITH THE STAFF THAT I USE AT CRA. THEY MAKE ME A
16 BETTER EXPERT, FRANKLY. AND IN THIS CASE WITH THIS SHORT HORIZON
17 I JUST WANT YOU TO KNOW -- AND I'LL SAY IT IN THE LETTER -- BUT
18 YOU WILL GET MY BEST EFFORTS, AND IT WILL BE MY EFFORTS. BUT I
19 SEE NO WAY OF DOING THIS, I DON'T THINK, ALONE.

20 **THE COURT:** WELL, HOW MANY STAFF PEOPLE DO YOU THINK
21 WOULD YOU NEED?

22 **MR. KEARL:** PARDON?

23 **THE COURT:** HOW MANY STAFF PEOPLE WOULD YOU BE
24 NEEDING?

25 **MR. KEARL:** I WOULD RELY ON PROBABLY TWO PEOPLE, A

1 PRINCIPAL IN THE SALT LAKE CITY OFFICE WHO HAS A PHD IN
2 ECONOMICS THAT WOULD SORT OF WORK WITH ME ON CRITIQUING THE
3 REPORTS.

4 AND THEN, ON WRITING MY OWN REPORT YOU DON'T WANT ME
5 TO SPEND THE TIME DOING THE FOOTNOTES AND ALL OF THAT SORT OF
6 STUFF. AND I WOULD USE A RESEARCH ASSOCIATE BILLED AT A LOW
7 RATE TO DO THE SORT OF THE PULLING TOGETHER OF THE MATERIALS.

8 **THE COURT:** WHEN THEY BUST YOU ON CROSS-EXAMINATION
9 BECAUSE THE FOOTNOTE IS NO GOOD THEN --

10 **MR. KEARL:** NO. NO.

11 **THE COURT:** -- LET'S SAY ARE YOU GOING TO BLAME IT ON
12 THE --

13 **MR. KEARL:** I VERIFY ALL THE FOOTNOTES. BUT AT LEAST
14 I FOUND AS I WORK WITH CLIENTS THAT THEY DON'T WANT ME TO SPEND
15 MY TIME SORT OF DOING THAT KIND OF STUFF.

16 THE FINAL THING -- AND IT'S CERTAINLY IN THE SPIRIT
17 OF FULL DISCLOSURE -- I DON'T SEE A WAY TO PROVIDE A BUDGET FOR
18 YOU. I CAN PROVIDE HOURS, BUT I KNOW NOTHING ABOUT THIS CASE
19 AND I KNOW NOTHING ABOUT THE SCOPE OF THE RECORD THAT EVEN
20 NARROWED TO THESE TWO EXPERTS AND WHAT WILL BE IN THEIR
21 FOOTNOTES, AND IN THEORY I CAN'T TELL YOU SORT OF WHAT SITTING
22 HERE TODAY -- I SIMPLY CAN'T TELL YOU HOW MANY HOURS. BUT I CAN
23 TELL YOU WHAT MY HOURLY RATE WOULD BE AND THAT WOULD BE --

24 **THE COURT:** WELL, I WOULD WANT TO KNOW YOUR HOURLY
25 RATE, BUT THE HELPERS --

1 **MR. KEARL:** SURE. AND I WOULD PROVIDE THAT.

2 **THE COURT:** YOU KNOW, I HAVE TO TAKE INTO ACCOUNT THE
3 OVERALL BUDGET. AND IF YOU IN FAIRNESS CAN'T DO IT, THEN YOU
4 CAN'T DO IT. AND THAT'S NOT A DEAL KILLER, EITHER. IT'S JUST
5 ONE PIECE OF INFORMATION THAT WOULD BE USEFUL. BUT IF YOU CAN'T
6 GIVE IT, THEN I HAVE TO DECIDE BASED ON WHAT INFORMATION I HAVE.
7 ALL RIGHT.

8 **MR. COOPER:** YOUR HONOR, WOULD THE 706 EXPERTS BE
9 PERMITTED TO DIRECT QUESTIONS TO THE PARTIES' EXPERTS DURING
10 DEPOSITION?

11 **THE COURT:** I'VE GOT TO THINK ABOUT THAT. WHAT DO
12 YOU THINK? I THINK YOU SHOULD BE THERE TO ASK THOSE QUESTIONS.

13 **MR. COOPER:** I WOULD BE THERE, AND I WOULD TAKE THE
14 QUESTIONS, OBVIOUSLY, FROM THE 706 EXPERT. FROM THE MATERIAL
15 THAT I'VE READ FOLLOWING FEDERAL CIRCUIT'S OPINION I BELIEVE
16 THEY ARE PERMITTED NOT ONLY TO ASK QUESTIONS DURING THE
17 DEPOSITION, BUT ARE PERMITTED SUBJECT TO YOUR HONOR'S DISCRETION
18 TO ASK QUESTIONS OR DIRECT QUESTIONS DURING TRIAL.

19 **THE COURT:** WELL, I WOULD -- I'M GOING TO -- I LIKE
20 THAT IDEA. BEFORE I SAY "YES" TO IT I WOULD WANT TO LET THE
21 LAWYERS WEIGH IN ON IT. BUT LET'S PUT THAT ON THE TABLE AS A
22 POSSIBILITY.

23 **MR. COOPER:** OKAY.

24 **THE COURT:** MAY I ASK YOU WHILE YOU ARE STANDING -- I
25 NEED TO BRING THIS TO A CLOSE BECAUSE THE U.S. ATTORNEY'S OFFICE

1 WANTS TO HAVE A HEARING ON SOMETHING. BUT CAN YOU THINK OF ANY
2 OTHER WAY TO MAKE THIS RUN SMOOTHER, EVEN IF -- I'M FOCUSING
3 MAINLY IN THE NEXT WEEK AND A HALF TO HELP ME GET TO THE BOTTOM
4 OF WHAT -- AND COMING UP WITH WHAT THE ASSIGNMENT IS GOING TO
5 BE, WHAT IDEAS DO YOU HAVE?

6 **MR. COOPER:** WELL, THE FIRST IDEA I HAD WAS TO SEE IF
7 WE COULD LOOK AT THE REPORTS TO DISCERN FOR THE 706 EXPERTS THE
8 COMMON FACTS AND THE COMMON ISSUES.

9 SECONDLY, I THINK THAT THERE'S SOME -- THERE ARE
10 TWO -- I WOULD HAVE TWO CLIENTS HERE WHO ARE SOMEWHAT IN
11 COMPETITION. SO I THINK THAT MY COMMUNICATION WITH THEM AT
12 LEAST IN THIS EARLY STAGE OF WRITING THE LETTERS PARTICULARLY
13 WITH REGARD TO FEES SHOULD BE SOMEWHAT LIMITED THERE.

14 BUT THEN, I ASK THE QUESTION AS TO WHETHER -- I KNOW
15 THE EXPERTS CANNOT COMMUNICATE WITH THE COURT INDEPENDENTLY, BUT
16 WOULD I -- WOULD THE PARTIES OBJECT TO THE EXTENT THAT I
17 COMMUNICATE WITH THE EXPERTS AND WITH THE COURT OR SHOULD THAT
18 ALL BE DONE WITH FULL VISIBILITY?

19 **THE COURT:** LET'S BE CLEAR. IT'S OKAY, ISN'T IT,
20 THAT THEY CAN SEND ME THEIR PROPOSALS, THEIR FEE PROPOSALS AND
21 THEIR AVAILABILITIES AND THAT SORT OF THING.

22 **MR. COOPER:** OH, YES. BUT IN TERMS OF ME REPRESENTING
23 BOTH OF THEM AT THE SAME TIME DURING THE FEE PROPOSALS, I
24 THOUGHT THAT SHOULD BE INDEPENDENT.

25 **THE COURT:** NO, YOU SHOULDN'T BE DOING THAT. AND YOU

1 DON'T NEED TO DO THAT PART.

2 **MR. COOPER:** RIGHT.

3 **THE COURT:** HOW ABOUT THIS? WOULD EVERYONE AGREE
4 THAT THE MATERIALS THAT WERE USED ON THE DAUBERT HEARING, ONE OF
5 THE TWO SIDES, MAYBE BOTH OF YOU, THAT THAT BE MADE AVAILABLE?
6 THAT IS AVAILABLE NOW, INCLUDING THE ORDER THAT I PUT OUT. AND
7 THAT THAT COULD BE -- THE EXPERTS COULD BE -- COULD LOOK AT THAT
8 TO GET SOME BACKGROUND ON THE CASE EVEN BEFORE WE GET TO THE NEW
9 REPORTS. IS THAT SOMETHING THAT -- FIRST LET ME ASK THE TWO
10 SIDES: IS THAT OKAY?

11 **MR. VAN NEST:** SURE. THAT'S FINE. YOU ARE TALKING
12 ABOUT YOUR ORDER AND THE MATERIALS WE SUBMITTED WITH OUR MOTION?

13 **THE COURT:** CORRECT, INCLUDING ANYTHING THAT WAS
14 UNDER SEAL.

15 **MR. VAN NEST:** SURE.

16 **THE COURT:** HOW ABOUT MR. JACOBS?

17 **MR. JACOBS:** THAT'S FINE, YOUR HONOR. I JUST ASSUMED
18 FOR THE SAKE OF GOOD ORDER THAT BOTH EXPERTS --

19 **THE COURT:** THEY WOULD SIGN ON THE PROTECTIVE ORDER.

20 **MR. JACOBS:** TERRIFIC.

21 **THE COURT:** ALL RIGHT.

22 **MR. KEARL:** YES.

23 **THE COURT:** AND SO MR. COOPER WOULD YOU COORDINATE IN
24 GETTING TO -- YOU COULD AT LEAST SEND BOTH SIDES THE SAME PACKET
25 OF MATERIAL.

1 **MR. COOPER:** YES. YES.

2 **THE COURT:** ALL RIGHT.

3 **MR. COOPER:** AND I ASSUME IT'S AVAILABLE
4 ELECTRONICALLY.

5 **MR. VAN NEST:** YES.

6 **THE COURT:** NOW, I'M GOING TO WANT YOUR LETTERS, SAY,
7 IN A WEEK OR SO. SO COULD YOU GET THEM TO ME BY, SAY, AT LEAST
8 IN A WEEK? A WEEK FROM NOW SO THAT -- BECAUSE I WOULDN'T WANT
9 YOU TO WAIT UNTIL YOU READ ALL THIS STUFF. YOU MAY NOT EVEN GET
10 THIS MATERIAL FOR A WEEK. AND MR. COOPER IS GOING TO HAVE TO
11 GET YOU SIGNED ON TO THE PROTECTIVE ORDER.

12 YES, SIR.

13 **MR. DEGEN:** YES.

14 **MR. KEARL:** LET ME CLARIFY. YOU WANTED THE LETTERS,
15 A TIMETABLE, STAFFING PROPOSAL. AND --

16 **THE COURT:** AND ANY CONFLICTS. ANY OF THE ISSUES
17 WE'VE TALKED ABOUT HERE TODAY YOU THINK I SHOULD KNOW ABOUT THAT
18 WOULD BE A PRO OR A CON, I WOULD LIKE TO KNOW ABOUT.

19 **MR. KEARL:** OKAY.

20 **THE COURT:** AND KEEP IN MIND THAT EVENTUALLY I'LL
21 PROBABLY LET THE LAWYERS SEE THE LETTER.

22 YES, SIR.

23 **MR. DEGEN:** HONESTLY, YOUR HONOR, IF THE SPECTRUM IS
24 OCTOBER 1 TRIAL --

25 **THE COURT:** OCTOBER 31ST.

1 **MR. DEGEN:** OCTOBER 31 IS STILL ON THE TABLE MAYBE
2 YOU SHOULD ASK FOR THE LETTERS BY TUESDAY.

3 **THE COURT:** TO DO WHAT?

4 **MR. DEGEN:** ASK FOR THE LETTERS BY TUESDAY. I MEAN,
5 I'M VERY CONCERNED WITH THE WHOLE --

6 **THE COURT:** I WON'T BE HERE NEXT WEEK, SO I WON'T BE
7 ABLE TO MAKE A DECISION BY TUESDAY.

8 **MR. DEGEN:** I SEE.

9 **THE COURT:** BUT LET'S SAY -- OKAY. LET'S SAY BY
10 FRIDAY SO THAT I CAN MAKE A DECISION THE FOLLOWING WEEK.

11 **MR. DEGEN:** BECAUSE, IN GENERAL, WHAT I'M HEARING IS
12 IF WE'RE GOING TO ASK QUESTIONS AT DEPOSITION, YOU KNOW THE
13 TIMETABLE FOR THIS WHOLE THING IS GOING TO BE REALLY TIGHT IF IT
14 STAYS ON ITS CURRENT TRIAL SCHEDULE.

15 **THE COURT:** SEE, I WON'T HAVE ANY PROBLEM WITH
16 POSTPONING IT SOME. BUT AS SOON AS I START SUGGESTING THAT,
17 THEN THE LAWYERS WILL ANGLE FOR WHAT THEY WANT TO HAVE. YOU
18 KNOW, THEY HAVE A HIDDEN AGENDA. AND THE HIDDEN AGENDA'S ALWAYS
19 VERY WELL CAMOUFLAGED AND HIDDEN. SO I JUST LIKE TO KEEP THEIR
20 FEET TO THE FIRE. AND USUALLY I DO IT. BUT IT MAY BE -- SEE,
21 YOU HAVE THIS PRACTICAL PROBLEM. I WANT YOU AT THOSE
22 DEPOSITIONS, AND I WANT YOU TO HAVE TIME TO DO A GOOD
23 PROFESSIONAL JOB.

24 SO THAT MAY MEAN THAT WE WOULD SLIP THIS TRIAL FOUR
25 WEEKS. IT WOULD BE IN THAT RANGE. IT WON'T BE IN THE RANGE OF

1 THREE MONTHS.

2 I GOT TO COME BACK TO MY ORIGINAL PROBLEM, THOUGH. I
3 HAVE A -- I THINK IT'S THE LARGEST CASE IN THE HISTORY OF THIS
4 COURT THAT GOES BACK TO 1852. WE'VE NOW SURPASSED 5,000 FILINGS
5 IN THE CASE. AND I STILL HAVE TRIAL NUMBER TWO TO DO, WHICH IS
6 SET FOR OCTOBER.

7 I HAVE TO GIVE THAT AND THE REST OF MY CRIMINAL
8 CALENDAR PRIORITY. AND I DON'T KNOW HOW THAT'S GOING TO SHAKE
9 OUT. SO I HAVE THAT INDEPENDENTLY OF ALL OF THIS TO DO.

10 BUT IF IT LOOKS LIKE THAT CASE IS GOING TO GO AS
11 SCHEDULED AND THE LAWYERS THERE DO NOT NEED A CONTINUANCE, THEN
12 I MAY BE FORCED TO DO THIS CASE ON OCTOBER 31ST, MEANING OURS.

13 SO YOU SEE IF I ONLY HAD THIS CASE TO DEAL WITH, I
14 WOULD SAY RIGHT NOW LET'S JUST SLIP IT FOUR WEEKS. WE WILL
15 START -- WE WILL JUST CONSUME OUR CHRISTMAS HOLIDAYS. THE
16 HOLIDAYS NEVER GOT -- DID YOU KNOW YOU PROBABLY -- YOU CAN'T GET
17 A LAWYER TO DO ANYTHING IN THE, QUOTE, "HOLIDAYS." IT'S TRUE.
18 AND THE HOLIDAYS RUN FROM OCTOBER 31 TO VALENTINE'S DAY. I HAVE
19 LEARNED THAT IN THIS JOB.

20 THE HOLIDAYS ARE NOT JUST, YOU KNOW, DECEMBER. ALL
21 RIGHT.

22 WE'RE GOING TO -- I NEED TO BREAK HERE. AND I WANT
23 TO END BY THANKING YOU. YOU ARE WONDERFUL TO BE INTERESTED IN
24 DOING THIS.

25 IT WOULD BE A SERVICE TO THE COURT, AND I THINK TO

1 THE JURY. AND I BELIEVE A MOST INTERESTING ASSIGNMENT TO BOOT.
2 SO GOOD LUCK TO YOU. I LOOK FORWARD TO HEARING FROM YOU. AND
3 THANK YOU FOR COMING.

4 WE WILL BE ADJOURNED.

5 I'M GOING TO STEP OUTSIDE AND GET MY OTHER FILE, AND
6 THEN I'M READY TO GO WITH THE CRIMINAL APPEAL IN JUST A MOMENT.

7 ALL RIGHT? THANK YOU.

8 (THEREUPON, THIS HEARING WAS CONCLUDED.)

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1 CERTIFICATE OF REPORTER

2 I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY
3 THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED
4 SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO
5 TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE
6 RECORD OF SAID PROCEEDINGS.

7 I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR
8 ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING
9 PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE
10 OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

11 THE FEE CHARGED AND THE PAGE FORMAT FOR THE
12 TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL
13 CONFERENCE.

14 IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS
15 22ND DAY OF AUGUST, 2011.

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21 \S\KATHERINE WYATT
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